SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 290

JAMES M. HURD AND MARY I. HURD,

Petitioners,

vs.

FREDERIC E. HODGE, LENA A. MURRAY HODGE, PASQUALE DeRITA, VICTORIA DeRITA, CONSTANTINO MARCHEGIANI, MARY M. MARCHEGIANI, BALDUINO GIANCOLA AND MARGARET GIANCOLA,

Respondents

No. 291

RAPHAEL G. URCIOLO, ROBERT H. ROWE, ISABELLE J. ROWE, HERBERT B. SAVAGE, GEORGIA N. SAVAGE AND PAULINE B. STEWART,

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Respondents

CONSOLIDATED BRIEF FOR PETITIONERS

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Date: November 17, 1947.

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APPENDIX

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Opinions Below

The Opinion of the Court of Appeals (R. 417-432) is reported in 162 F. (2d) 233. The District Court's Findings of Fact, Conclusions of Law and Judgment in *Hurd* v.

Hodge et al. (No. 290) are on pages 379-385 of the Record, and in *Urciolo et al.* v. *Hodge et al.* (No. 291) on pages 406-413 of the Record.

Jurisdiction

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code. 28 U. S. C. Sec. 347 (a).

The judgments sought to be reviewed were entered by the United States Court of Appeals for the District of Columbia on the 26th day of May, 1947 (R. 433). Motion for rehearing was duly filed and denied on the 23rd day of June, 1947 (R. 434, 453). Consolidated petitions for certiorari, filed on August 22, 1947, were granted on October 20, 1947 (R. —).

Statement of the Case

In No. 290, petitioners James M. and Mary I. Hurd were the grantees from one Ryan and his wife [1] of a parcel [2] of improved residential land in the 100 block of Bryant Street, Northwest, in the District of Columbia (R. 381).

In No. 291, petitioner Urciolo, a real estate dealer (R. 144) and the owner of 6 parcels [3] in the same block, sold and conveyed 3 of these parcels [4] to petitioners Rowe, Savage and Stewart, respectively (R. 382).

All these grantees now respectively occupy as their homes the property thus conveyed to them (R. 381, 382). The respondents, owners of other lots in the same block, originated these proceedings in the United States District Court for the District of Columbia to secure injunctions to oust

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[1] Francis X. Ryan and his wife, the grantors of petitioners Hurd, were subjected to jurisdiction by publication, and never appeared or participated in the case, and are not parties to these petitions.

[2] Premises 116 Bryant Street, Northwest.

[3] Premises 118, 126, 134, 144, 150 and 152 Bryant Street, Northwest.

[4] Premises 118, 134, and 150 Bryant Street, Northwest.

the grantees from their homes because of the existence of a racial restrictive covenant.

In the 100 block of Bryant Street, Northwest, there are 31 lots on the south side of the street improved by 31 dwellings; the north side of the street is the southern boundary of a public park (R. 381). Twenty lots on the south side of the street were sold about 1906 subject to the following covenant in the respective deeds (R. 380):

> "Subject also to the covenants that said lot shall never be rented, leased, sold, transferred or conveyed unto any Negro or colored person under a penalty of Two Thousand Dollars ($2,000), which shall be a lien against said property."

The 7 lots here involved are part of these 20 lots. The remaining 11 of the 31 lots on the south side of the street, as well as almost all of the contiguous areas to the south and west, have been owned and occupied by Negroes for many years (R. 381). There have been numerous sales of lots in this block (R. 324-327); several of the lots are no longer owner-occupied, but are rented to tenants (R. 40-41, 278-279). The grantee petitioners acquired their respective parcels of land, not from the original imposer of the covenant, but from persons who were themselves remote grantees (R. 3, 156, 324, 326, 327, 357-358). All of the grantee petitioners had purchased their homes after numerous hardships and prolonged unsuccessful efforts to obtain adequate housing for themselves and their families; the Rowes, Savages and Stewarts had been evicted from their previously rented homes because the owners desired the houses for their own occupancy (R. 216-219, 227-228, 241, 309-310). Several of the petitioners have expended considerable time and money in repairing and improving their present homes (R. 156, 243, 311-312). The residential

property in the area has a 30% greater monetary sale value to Negro purchasers than to white purchasers (R. 261, 263).

The trial court found that both Urciolo (petitioner in No. 291, who appears *pro se*), and the Ryans [5] (who are not petitioners herein) are white (R. 380) and that the other petitioners in both Nos. 290 and 291, including Hurd who has steadfastly claimed to be a Mohawk Indian (R. 238), are Negroes (R. 380). The District Court thereupon rendered judgments (1) declaring null and void the deeds to the grantee petitioners and revesting title in Urciolo and Ryan respectively; (2) permanently enjoining Urciolo and Ryan, respectively, from renting, leasing, selling, transferring or conveying any of the above 7 lots to any Negro or colored person; (3) permanently enjoining the grantee petitioners from renting, leasing, selling, transferring or conveying their above respective premises to any one; and (4) ordering the Negro petitioners "to remove themselves and all of their personal belongings from the land and premises now occupied by them" (R. 384-5, 411-12). The decree made no provision for returning to the grantees the money which they had paid for their homes,[6] or for paying them for the repairs and improvements which they made on their homes.

The Court of Appeals (Justices Clark and Wilbur K. Miller) affirmed on the basis of its prior decisions, holding that "the appellants have presented no contention that is not answered by those decisions" (R. 418). Justice Edger-

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[5] The Ryans have not appeared or participated in the case and the trial court's finding that they are white is unsupported by any evidence whatever (R. 380, 407).

[6] The money that the Hurds had "invested in this house represents our lifetime savings" (R. 80). Petitioner Stewart paid "for the house $9,450" (R. 219).

ton dissented (R. 420) on five general[7] grounds, each independent of the other four, namely:

1. "The covenants are void as unreasonable restraints on alienation."

2. "They are void because contrary to public policy."

3. "Their enforcement by injunction is inequitable."

4. "Their enforcement by injunction violates the due process clause of the Fifth Amendment."

5. "Their enforcement by injunction violates the Civil Rights Act." (Rev. Stats., Sec. 1978, 8 U. S. C., Sec. 42.)

Each ground considered by Justice Edgerton was briefed and argued by petitioners in the Court of Appeals.[8]

Questions Presented

Whether the judicial enforcement, under the law of the District of Columbia, of restrictions on the sale of land by a willing seller and the acquisition and occupancy of land by a willing buyer, where the restriction is based solely on the race or creed of the buyer:

(1) violates the Fifth Amendment to the Constitution;

(2) is contrary to Sec. 1978, Revised Statutes, 8 U. S. C., Sec. 42;

(3) violates a treaty of the United States, namely, the Charter of the United Nations;

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[7] Justice Edgerton also dissented on two special grounds: (1) Enforcement of the covenant would defeat its original purposes since Negroes will pay much more than whites for the property and since the neighborhood is no longer white; and (2) the injunctions, against both transfer and occupancy, are broader than the covenant, since the covenant did not forbid use and occupancy. *Gospel Spreading Association, Inc.*, v. *Bennetts*, 79 U. S. App. D. C. 352, 147 F. 2d 878 (R. 422).

[8] A copy of the petitioners' consolidated brief in the Court of Appeals has been lodged with the Clerk of this Court.

(4) is contrary to the public policy of the United States;

(5) should be denied because the specific enforcement of such restriction would be of such discriminatory character and so grossly inequitable, that a court of equity should not lend its aid by enforcing the covenant; and

(6) should be denied because the covenants are void as unreasonable restraints on alienation.

Specification of Errors to Be Urged

The Court of Appeals for the District of Columbia erred:

(1) In failing to hold that enforcement of the covenant by Federal Court injunction violates the Fifth Amendment of the Constitution.

(2) In failing to hold that enforcement of the covenant by Federal Court injunction violates Sec. 1978, Revised Statutes, 8 U. S. C. Sec. 42.

(3) In failing to hold that enforcement of the covenant by Federal Court injunction violates the obligations assumed by the United States in the United Nations Charter.

(4) In failing to hold that the covenant and its enforcement are void because contrary to the public policy of the United States.

(5) In failing to hold that the hardship to grantee petitioners from enforcing the covenant would so outweigh the benefit to respondents that a court of equity should not enforce the covenant.

(6) In failing to hold that the covenant is void as an unreasonable restraint on alienation.

(7) In failing to reverse the judgments of the District Court for the District of Columbia.

The Basic Issue

These cases involve this fundamental issue: Shall we in the United States have ghettoes for racial, religious and other minorities, or even exclude such minorities entirely from whole areas of our country, by a system of judicially enforced restrictions based on private prejudices and made effective through the use of government authority and power?

The extensive area covered by these restrictions and the great number of persons and groups excluded from acquiring and occupying these lands for living space already constitute one of the gravest dangers to our national unity.

During the past two decades, racial restrictive covenants have been extensively imposed in most of the major cities of the nation on a large percentage of all newly constructed dwellings, new residential subdivisions, and existing residential properties contiguous to areas occupied by many of these excluded groups. Negroes have thus far been the major victims of this private, wholesale, and irresponsible "zoning" which, by placing such artificial yet impassable boundaries around the existing areas of Negro occupancy, has barred Negroes of all income groups from occupancy in most suburban areas where new construction has been concentrated, and has forced them into virtual ghettoes. Similar restrictions have been directed against persons of Mexican, Greek, Spanish, Armenian, Chinese, Korean, Filipino, Persian, Hindu, Ethiopian, Syrian, Japanese, Arabian and other ancestry, as well as "non-Caucasians", Latin-Americans, Jews, American Indians, Hawaiians, Puerto Ricans, and other groups, irrespective of their American citizenship or the use they would make of the land, and despite our pledge in the United Nations Charter "to practice tolerance and live together in peace

with one another as good neighbors." Preamble, United Nations Charter, 59 Stat. 1035.

These restrictions have been a direct and major cause of enormous overcrowding into slums, with consequent substantial disorganization of family and community life. These effects have not been, and cannot be, in our fluid society, confined to the intended victims of the restrictions; they permeate the community and exert a baneful influence upon the economic, social, moral and physical well-being of all persons, white and black, young and old, rich and poor. They are incompatible with the foundations of our republic and their judicial approbation may well imperil our form of government and our unity and strength as a nation.

Summary of Argument

Judicial enforcement of a restrictive covenant which, solely on the basis of race, (1) forbids a person from acquiring, occupying and selling land and (2) forbids an owner of land from selling it to any member of the restricted group, is in violation of the due process clause of the Fifth Amendment. This Court has held that the legislative imposition of such restriction is unconstitutional under the due process clause of the Fourteenth Amendment. The guaranty of due process in the Fifth Amendment is similar to that in the Fourteenth Amendment and applies to the District of Columbia. The due process clause applies to judicial action and prohibits governmental action through judicial recognition and enforcement of non-statutory law which denies due process. Both the legislature and the judiciary are arms of the government. A result forbidden by the Constitution to the legislature cannot be achieved through the judiciary. Hence, the judicial enforcement of restrictive covenants, against willing sellers and willing buyers, who have never been parties to the covenant, violates the Constitution.

The enforcement of racial restrictive covenants has drastically curtailed the ability of "non-Aryans" to secure adequate housing and has hemmed them into slums, blighted areas, and ghettoes. Racial restrictive covenants have been a direct and major cause of enormous overcrowding in the few areas available to Negro residential occupancy, with consequent substantial increase in disease, death, crime, immorality, juvenile delinquency and racial tensions, increased strains on public facilities and services, and economic exploitation through artificially inflated rental and housing costs. They constitute a direct danger to the American principle of "equality before the law" and to our national unity. In the light of these effects and conditions, the judicial enforcement of restrictive covenants is clearly incompatible with the due process clause of the Constitution.

This Court did not, in *Corrigan* v. *Buckley*, 271 U. S. 323 (1926) decide the questions which are here presented. The decisions of the courts below, as well as the decisions of State courts since 1926 in cases involving racial restrictive covenants either did not involve the contentions here urged, or were based on erroneous assumptions concerning the holding of *Corrigan* v. *Buckley*.

Judicial enforcement of restrictive covenants also violates Section 1978 of the Revised Statutes (8 U. S. C. sec. 42), as well as a treaty of the United States, namely, the United Nations Charter.

Racial restrictive covenants and their enforcement by the courts are so plainly contrary to the public policy of the United States that the judgments of the court below should be reversed by this Court.

Because of the discriminatory character and inequity of the restrictions on the sale, purchase and occupancy of land solely on the basis of race, no court of equity should lend

its aid to the enforcement of such restrictions by the issu
ance of injunction.

Racial restrictive covenants are void as unreasonabl
restraints on alienation.

We call to the attention of this Court the following fou
analyses of the contentions here urged:

(1) Dissent of Justice Edgerton, in the case at ba
in the court below: *Hurd* v. *Hodge*, — App. D. C. —
162 F. (2d) 233, 235.

(2) D. O. McGovney, "Racial Residential Segrega
tion by State Court Enforcement of Restrictive Agree
ments, Covenants or Conditions in Deeds is Unconsti
tutional," 33 Calif. L. Rev. 5 (1945).

(3) Loren Miller, "Race Restrictions on Ownership
or Occupancy of Land," 7 Lawy. Guild Rev. 99 (May-
June 1947).

(4) Harold I. Kahen, "Validity of Anti-Negro
Restrictive Covenants: A Reconsideration of the
Problem," 12 U. of Chi. L. Rev. 198 (1945).

I

A. JUDICIAL ENFORCEMENT, UNDER THE LAW OF THE DISTRICT OF COLUMBIA, OF A RESTRICTIVE COVENANT WHICH, SOLELY ON THE BASIS OF RACE, (1) FORBIDS A PERSON FROM ACQUIRING, OCCUPYING AND SELLING LAND, AND (2) FORBIDS AN OWNER OF LAND FROM SELLING IT TO ANY MEMBER OF THE RESTRICTED GROUP, VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

These two cases involve two categories of petitioners, each of which asserts distinct types of property rights. (1) The grantee petitioners contend that judicial enforcement of the restrictive covenant violates the due process

clause because, solely on the basis of their race, they are prevented by governmental action from purchasing, occupying and selling land for residential purposes. (2) Petitioner Urciolo, the landowner whom the trial court found to be white, and whose occupation is the real estate business (R. 144), contends that judicial enforcement of the restrictive covenant violates the due process clause because, solely on the basis of the race of prospective buyers, he is prevented by governmental action from selling his property to a substantial proportion of the potential buyers of residential land.[9]

(1) THIS COURT HAS PROTECTED THE RIGHTS OF BOTH WHITE SELLERS AND NON-WHITE BUYERS AGAINST LEGISLATIVE RACIAL RESTRICTIONS.

In three different cases, this Court has held that legislative restrictions upon the alienation, acquisition and occupancy of land, based solely on race, are unconstitutional under the Fourteenth Amendment as a deprivation of property without due process of law.

Buchanan v. *Warley*, 245 U. S. 60;
Harmon v. *Tyler*, 273 U. S. 668;
City of Richmond v. *Deans*, 281 U. S. 704.

In *Buchanan* v. *Warley*, 245 U. S. 60, an ordinance of the City of Louisville, Kentucky, forbade colored persons from occupying houses in blocks where the greater number of houses were occupied by white persons, and contained the same prohibitions as to white persons in blocks where the greater number of houses were occupied by colored persons.

[9] The restrictive covenant is a two-edged sword. Owners of covenanted property often find, as time elapses and the neighborhood changes, that they are unable to dispose of their property to the prohibited groups, although their neighbors had already made such disposition. See Harold I. Kahen, "Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem", 12 Univ. Chi. L. Rev. 198, 204 (1945).

Buchanan, a white person, brought an action against Warley, a Negro, for the specific performance of a contract of sale of Buchanan's lot to Warley. Warley defended upon a provision in his contract excusing him from performance in the event that he should not have under the laws of the State and City, the right to occcupy the property as a residence, and contended that the ordinance prevented his occupancy. In its decision, this Court said:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Holden *v.* Hardy, 169 U. S. 366, 391" (245 U. S. 60, at p. 74).
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> . . . . . .
>
> "The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the States, or by one of its municipalities, solely because of the color of the proposed occupant of the premises? That one may dispose of his property, subject only to the control of lawful enactments curtailing that right in the public interest, must be conceded. The question now presented makes it pertinent to enquire into the constitutional right of the white man to sell his property to a colored man, having in view the legal status of the purchaser and occupant" (245 U. S. 60, at p. 75).

After reviewing the history and judicial interpretation of the Thirteenth and Fourteenth Amendments, and quoting Sections 1978[10] and 1977[11] of the Revised Statutes (8

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[10] Sec. 1978, Rev. Stat., 8 U.S.C. 42: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

[11] Sec. 1977, Rev. Stat., 8 U.S.C. 41: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the

U. S. C. 42, 41), this Court stated:

"In the face of these constitutional and statutory provisions, can a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence?

"The statute of 1866, originally passed under the sanction of the Thirteenth Amendment, 14 Stat. 27, and practically reenacted after the adoption of the Fourteenth Amendment, 16 Stat. 144, [Sec. 1978, Rev. Stat., 8 U. S. C. 42] expressly provided that all citizens of the United States in any State shall have the same right to purchase property as is enjoyed by white citizens. Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color. *Hall* v. *DeCuir*, 95 U. S. 485, 508. These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. *Civil Rights Cases*, 109 U. S. 3, 22. The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color" (245 U. S. 60, at pp. 78-79).

. . . . . .

"It is said that such acquisitions by colored persons depreciate property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results.

"We think this attempt to prevent the alienation of the property in question to a person of color was not a

full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case the ordinance cannot stand" (245 U. S. 60, at p. 82).

Harmon v. *Tyler*, 273 U. S. 668, was a suit to enjoin an owner of a cottage in a white community from leasing to Negro tenants without obtaining the consent of the majority of the white persons in the community. Such consent was required by statutes of the State of Louisiana and an ordinance of the City of New Orleans, Louisiana, prohibiting Negroes from establishing residence in a white community and whites from establishing residence in a Negro community, "except on the written consent of a majority of the persons of the opposite race inhabiting such community or portion of the city." The statutes and ordinance, said the Supreme Court of Louisiana, did "not forbid a white man to sell his property in a white neighborhood to a negro who intends to reside in it, or forbid a negro to sell his property in a negro neighborhood to a white man who intends to reside in it. The statutes and the ordinance merely forbid the purchaser in either case to carry out his intention, without the consent of a majority of the citizens of the other race residing in the neighborhood."[12] The State Supreme Court therefore upheld the validity of the statutes and ordinance and affirmed the issuance of the injunction. That judgment was summarily reversed by this Court upon the authority of *Buchanan* v. *Warley*.

In *City of Richmond* v. *Deans*, 281 U. S. 704, the record in this Court (No. 729, Oct. Term, 1929)[13] indicates that

[12] *Tyler* v. *Harmon*, 158 La. 439, 104 So. 200, 206; *ibid.*, 160 La. 943, 107 So. 704.

[13] This Court may take judicial notice of the record of the *City of Richmond* case on file in this Court. *United States* v. *Pink*, 315 U. S. 203, 216.

Deans, a Negro, had entered into a contract to purchase a dwelling in a block containing more white than Negro residents. A pre-existing ordinance of the City of Richmond, Virginia, attempted to achieve residential segregation of white and colored persons by prohibiting any person from residing in a block where the majority of residences were occupied by those with whom such person was forbidden to intermarry under State law. The City threatened to enforce the ordinance against Deans. Hence, without attempting to receive the deed for, or to move into, the dwelling, Deans filed a suit in the Federal District Court to enjoin the City from enforcing the ordinance against him. Deans alleged that he had equitable title by reason of his purchase contract, was prepared to take legal title, and was entitled to use the house as his residence. The City contended that no existing property right was involved since Deans had only an executory contract and had not yet acquired the deed to the property, and therefore that Deans was not protected by the 14th Amendment. This contention was rejected. The Circuit Court of Appeals for the Fourth Circuit, 37 F. (2d) 712, affirming the District Court, held that the ordinance, being based on race alone, was unconstitutional under the authority of *Buchanan* v. *Warley* and *Harmon* v. *Tyler*. This Court affirmed that decision expressly on the authority of those two cases. 281 U. S. 704.

These rulings have been uniformly followed to invalidate similar statutes in other States restricting sale and occupancy of residential property solely on the basis of race,[14]

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[14] Georgia: *Glover* v. *City of Atlanta*, 148 Ga. 285, 96 S.E. 562; *Bowen* v. *City of Atlanta*, 159 Ga. 145, 125 S. E. 199.
Maryland: *Jackson* v. *State*, 132 Md. 311, 103 Atl. 910.
North Carolina: *Clinard* v. *City of Winston-Salem*, 217 N. Car. 119, 6 S. E. (2d) 867.
Oklahoma: *Allen* v. *Oklahoma City*, 175 Okla. 421, 52 P. (2d) 1054.
Texas: *Liberty Annex Corp.* v. *City of Dallas*, 289 S. W. 1067, *aff'd*, 295 S. W. 591, 19 S. W. (2d) 845.
Virginia: *Irvine* v. *City of Clifton Forge*, 124 Va. 781, 97 S.E. 310.

and are applicable to the District of Columbia, since the Fifth Amendment also contains the guarantee of due process which is present in the Fourteenth Amendment.[15]

(2) THE PETITIONERS HERE HAVE BEEN DEPRIVED OF THEIR PROPERTY WITHOUT DUE PROCESS BY THE GOVERNMENT, ACTING IN THIS INSTANCE THROUGH ITS JUDICIAL ARM.

The decrees of the District Court, affirmed by the Court of Appeals, have adjudged null and void the deeds to the grantees, have ordered the grantees to vacate the land and premises and not to convey them to anyone, and have permanently enjoined Urciolo, whom the trial court found to be white, from renting, selling, leasing, transferring or conveying his lots to any Negro or colored person. It is not the private respondents, but the sovereignty, speaking through the court, that has issued mandates (a) to the grantee petitioners enjoining them from occupying, using or selling their property, and (b) to petitioner Urciolo, enjoining him from disposing of his property to any of a large number of people who constitute a substantial proportion of the potential buyers of residential land in the area. Failure to obey would result in prompt governmental enforcement of the decree. Such enforcement would include forcible dispossession of the grantees by governmental authorities[16] as well as governmental proceedings for contempt of court, with resulting fines and incarceration, behind steel bars, in jails maintained and operated by the Government.[17] As Justice Edgerton points out in his dis-

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[15] *Heiner* v. *Donnan*, 285 U. S. 312, 326; *Twining* v. *New Jersey*, 211 U. S. 78, 101; *Farrington* v. *Tokushige*, 273 U. S. 284, 299; *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 329.

[16] When the marshal dispossesses a grantee, he acts pursuant to statute and "under the authority of the United States." 11 D. C. Code (1940) sec. 1101; 28 U.S.C. sec. 503.

[17] As Robert W. Kenny, then Attorney General of the State of California, has succinctly stated in a brief *amicus curiae* which he filed against

sent below (R. 425): "The action that begins with the decree and ends with its enforcement is obviously direct government action." 162 F. (2d) at 239.

Such enforcement by a court, through the issuance of its decrees with the potential threat of governmental punishment for violation of those decrees, is the very essence of governmental action. The respondents here, however, cannot by themselves complete their discrimination against the grantee petitioners and against Urciolo, but have sought the aid of the State, through a declaration and enforcement of its law by its judicial arm. Had there been here involved a law declared and enacted by the legislature, such a law—plainly invalid under the *Buchanan*, *Harmon*, and *City of Richmond* cases—would have required identical enforcement, namely, through the judicial arm.

If, because of the existence of a racial restrictive covenant, a Negro is privately persuaded or prevented from purchasing property, or a landowner is privately persuaded or prevented from selling to a Negro, or if the parties to the restrictive agreement each refuse to sell to a Negro, it is the action of the parties which effectively keeps the Negro out and which limits the market of the landowner. They do not represent the Government, nor are they assisted by the Government. In each of these cases the discrimination is being effected without resort to governmental force.

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the enforcement of a racial restrictive covenant in *Anderson* v. *Auseth*, L. A. No. 19,759, now pending before the Supreme Court of California: "The state as a whole is interested in this matter. The aid of its Courts, *nisi prius* and appellate, has been sought; its clerks, sheriffs and constables have been called to issue and serve writs which issue in the name of the People of the State of California; ultimately (if the hopes of plaintiffs and appellants are realized) even the jails of the State may be called upon to play a part in these actions." See Loren Miller, "Race Restrictions on Ownership or Occupancy of Land", 7 Lawyers Guild Rev., No. 3, pp. 99, 107, n. 73 (May-June, 1947). The Negro Handbook (1946-47) (F. Murray, ed.) p. 35, lists several instances during 1946-47 in which courts enforcing restrictive covenants have cited grantees for contempt or have imprisoned them.

Their action at that point is like the action of the innkeeper who refuses to serve a Negro, which was characterized as an "individual invasion of individual rights" in the *Civil Rights Cases*, 109 U. S. 3, 11. But when private persuasion or pressures are ineffective to maintain obedience to the covenant, and it is necessary to resort to the courts for its enforcement, individual action ceases and governmental action begins.[18] The very fact that enforcement of the covenant is sought to be imposed against the wills of the sellers and

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[18] Professor McGovney has succinctly stated this distinction as follows:

"The refusal of a landowner to sell to an offerer because the latter is a Negro, like the refusal of an innkeeper to serve an applicant for the same reason, is action by a private person which accomplishes its objective without need for calling on the state for aid. It is immaterial that he refuses because he thinks a restrictive agreement he has made binds him. The refusal of the landowner is no more forbidden by the Constitution than that of the innkeeper. Thus it has been correctly said by one Court that no man can be compelled to sell his land to a Negro, no doubt meaning compelled to accept an offer by a Negro. That is not the issue. The question is whether a state can prevent purchase by a Negro from a *willing* seller, or prevent occupancy by a Negro who has bought from a *willing* seller."

. . . . . .

"The discriminatory agreements, conditions or covenants in deeds that exclude Negroes or other racial minorities from buying or occupying residential property so long as they remain purely private agreements are not unconstitutional. So long as they are voluntarily observed by the covenantors or the restricted grantees no action forbidden by the Constitution has occurred. But when the aid of the state is invoked to compel observance and the state acts to enforce observance, the state takes forbidden action. The deed to the colored buyer cannot be cancelled by purely private action. The Negro cannot be ousted from occupancy by purely private action. When a state court cancels the deed or ousts the occupant, the state through one of its organs is aiding, abetting, enforcing the discrimination." D. O. McGovney, "Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional", 33 Calif. L. Rev. 5, 20-21 (1945). See also Harold I. Kahen, "Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem", 12 U. of Chi. L. Rev. 198, 211 (1945); Loren Miller, "Race Restrictions on Ownership or Occupancy of Land", 7 Lawy. Guild Rev. 99, 106-107 (May-June, 1947).

buyers of the property demonstrates the public authority aspect of the proceeding.

The distinction between private action and governmental action was clearly indicated in the *Civil Rights Cases*, 109 U. S. 3, at p. 17, where this Court said:

> "In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, *unsupported by State authority in the shape of* laws, customs, or *judicial* or executive *proceedings*. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but *if not sanctioned in some way by the State, or not done under State authority*, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress." (emphasis supplied.)

The thesis that racial discrimination is forbidden by the Constitution if directly supported in any way by governmental power, whether by laws or through judicial or executive proceedings, pervades this Court's opinion in the *Civil Rights Cases*. At almost every page, this Court referred to State action as being more than merely a Statute, and as including *judicial* action.[19] And this Court illustrated its

[19] *E.g.*, At Page 11: The 14th Amendment "nullifies and makes void all State legislation, *and State action of every kind* which" etc. It operates "against . . . the action of State officers executive *or judicial*, when" etc., and "against State laws *and State proceedings* affecting those rights. . . ." At page 13: The 14th Amendment does not operate "until some State law has been passed, *or some State action through its officers or agents has been taken*, adverse to the rights of citizens. . . ." It operates "against State laws *and acts done under State authority* . . . that is, State laws, *or State action of some kind*, adverse" etc. At page 14: ". . . action of the State *or its authorities*. . . ." At page 15: ". . . against such State legislation *or action*. . . ." At page 16: Section 1977, Rev. Stats., 8 U.S.C. sec. 41, this Court said, is valid because it operates "against State laws

meaning by discussing, with approval, *Ex Parte Virginia*, 100 U. S. 339 (action by a *judge* in excluding Negroes from juries held to be governmental action forbidden by 14th Amendment), and stating that the 14th Amendment

> "is directed against *those who, assuming to use the authority of the State government*, carry into effect such a rule of disqualification. In the Virginia case, the State, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract. *Whether the statute book of the State actually laid down any such rule of disqualification, or not, the State, through its officer, enforced such a rule: and it is against such State action, through its officers and agents*, that the" [14th Amendment applies.] 109 U. S. 3, 15. (Emphasis supplied).

(3) JUDICIAL ACTION IS SUBJECT TO THE DUE PROCESS CLAUSE.

This Court has consistently and repeatedly held that the due process clause,[20] admittedly subject to infringement by legislative action, may equally be violated when the government acts through the courts in declaring and enforcing the

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and proceedings, and customs having the force of law, which sanction the wrongful acts specified." At page 17: ". . . some shield of State law *or State authority*. . . ." At page 18: ". . . some State law *or State authority* . . . State legislation *or State action* . . . State laws *or proceedings of State officers*, . . ." At page 23: ". . . State laws *and proceedings* . . . State *regulations or proceedings* . . . without any sanction or support from any State law *or regulation*. . . ." At page 24: The 14th Amendment is violated when "the denial of the right has *some State sanction or authority* . . . State laws, *or State action* . . ."

[20] "The Fifth Amendment, applicable to these cases, provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ." The Fourteenth Amendment provides: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ." The due process clause of the Fifth Amendment imposes upon the Federal Government the same restraints as are imposed on the states by the due process clause of the Fourteenth Amendment. *Heiner* v. *Donnan*, 285 U. S. 312, 326; *Twining* v. *New Jersey*, 211 U. S. 78, 101; *Farrington* v. *Tokushige*, 273 U. S. 284, 299; *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 329.

common law, substantive as well as procedural. As Justice Edgerton, dissenting below, stated (R. 425; 162 F. (2d) at pp. 239-240):

> "Since courts are arms of government they are subject, like legislatures and executive officers, to the restrictions that the Constitution imposes on government. Every case that holds legislation unconstitutional holds in terms or in effect that its judicial enforcement would be unconstitutional. The Constitution does not exempt any kind of judicial action from the requirements of due process of law . . . Rules which the due process clause forbids legislatures to enact it forbids courts to adopt, for substantive due process is not a matter of method. A judicial decree which would be invalid if it had legislative sanction is not validated by lack of legislative sanction."

The first general expression by this Court of the scope of governmental action covered by the Fourteenth Amendment appears in *Virginia* v. *Rives*, 100 U.S. 313, 318 (1879):

> "It is doubtless true that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another."

In *Ex Parte Virginia*, 100 U.S. 339, 346-47, the case immediately following *Virginia* v. *Rives, supra*, this Court more comprehensively stated:

> ". . . They [the prohibitions of the 14th Amendment] have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers

> are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

The due process clause guards against judicial action not only on procedural questions but also on substantive questions. Thus, in *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226 (1896), involving the constitutionality of a decision by the Supreme Court of Illinois which had upheld the award of only $1.00 damages by a jury in a condemnation proceeding, Mr. Justice Harlan, speaking for the Court, said (pp. 234-235):

> "Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defense. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction of the subject-matter and of the parties, and the defendant having full opportunity to be heard—met the requirement of due process of law. *United States* v. *Cruikshank*, 92 U. S. 542, 554; *Leeper* v. *Texas*, 139 U. S. 462, 468. *But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the*

statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form . . . the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of that amendment." (Emphasis supplied.)

Thus, judicial action, not involving any statute,[21] has been held by this Court to be State action in deciding a variety of procedural and substantive questions arising under the due process clause of the Fourteenth Amendment. In criminal cases, the challenged action by the State court has related both to procedural matters such as the selection of jurors,[22] failure to provide counsel,[23] the inability to

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[21] Even where a statute is involved, this Court has frequently limited its decision respecting violation of due process *to the manner in which the court applied* the statute to the specific facts presented. Thus, in *Fiske* v. *Kansas*, 274 U. S. 380, 387, this Court held that the *judicial application* of the statute, not the statute itself, "is an arbitrary and unreasonable exercise of the police power of the State, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment." See also *Thomas* v. *Collins*, 323 U. S. 516, 532-533; *Marsh* v. *Alabama*, 326 U. S. 501, 504, 509.

[22] *Ex Parte Virginia*, 100 U. S. 339; *Neal* v. *Delaware*, 103 U. S. 370 (1880). In *Neal* v. *Delaware*, *supra*, this Court said at page 397: "The action of those officers (court officials charged with the selection of grand and petit jurors) in the premises is to be deemed the act of the State; and the refusal of the State court to redress the wrong by them committed was a denial of a right secured to the prisoner by the Constitution and laws of the United States." See also *Norris* v. *Alabama*, 294 U. S. 587, 589; *Carter* v. *Texas*, 177 U. S. 442, 447; *Rogers* v. *Alabama*, 192 U. S. 226, 231; *Martin* v. *Texas*, 200 U. S. 316, 319 (exclusion of Negroes from juries; in each of these decisions this Court stated that the Fourteenth Amendment may be violated by "action of a State, whether through its legislature, through its courts, or through its executive or administrative officers").

[23] *Powell* v. *Alabama*, 287 U. S. 45; *Williams* v. *Kaiser*, 323 U. S. 471; *Tomkins* v. *Missouri*, 323 U. S. 485; *Hawk* v. *Olson*, 326 U. S. 271; *DeMeerleer* v. *Michigan*, 329 U. S. 663.

protect the jury from public hysteria,[24] and convictions through the use of coerced confessions,[25] or through perjured testimony knowingly used;[26] and to substantive matters such as conviction for common law offences,[27] and judicial power to punish for contempt.[28] In these decisions this Court has uniformly recognized, as expressed in *Twining* v. *New Jersey*, 211 U. S. 78, 90-91, that "The judi-

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[24] *Moore* v. *Dempsey*, 261 U. S. 86. See dissenting opinion of Mr. Justice Holmes (Mr. Justice Hughes concurring) in *Frank* v. *Mangum*, 237 U. S. 309, 345, 347:

". . . Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard. Mob law does not become due process of law by securing the assent of a terrorized jury . . .

"When such a case is presented, it cannot be said, in our view, that the state court decision makes the matter *res judicata*. *The State acts when by its agency it finds the prisoner guilty and condemns him.*" (Emphasis supplied.)

[25] *Chambers* v. *Florida*, 309 U. S. 227; *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Brown* v. *Mississippi*, 297 U. S. 278; *White* v. *Texas*, 310 U. S. 530.

[26] *Mooney* v. *Holohan*, 294 U. S. 103: "The due process clause of the Fourteenth Amendment governs any action of a State through its legislature, its courts, or its executive officers, including action through its prosecuting officers."

[27] In *Cantwell* v. *Connecticut*, 310 U. S. 296, 307-311, Cantwell was convicted of the common law offense of inciting a breach of the peace, based upon his playing phonograph records on the street offensive to the religious beliefs of persons requested by him to listen to them. There was no question of jurisdiction, or of opportunity to be heard. This Court held that in the circumstances the common law conviction violated the constitutional guarantees of the due process clause of the Fourteenth Amendment, and referred to the court's action as action "of the State."

[28] This Court has in several cases held that convictions by a State court for criminal contempt because of newspaper comment on pending litigation constituted State action which did not meet the tests of the due process clause of the Fourteenth Amendment. *Bridges* v. *California*, 314 U. S. 252; *Pennekamp* v. *Florida*, 328 U. S. 331; *Craig* v. *Harney*, 331 U. S. 367. Even the dissent in the latter case (Justice Frankfurter, speaking for himself and Chief Justice Vinson) at p. 385 agreed that: "We are not, therefore, merely reviewing a decision of the Texas court; we are passing upon the power of the State of Texas. 'The question before us must be considered in the light of the total power the State possesses. . . . .' *Skiriotes* v. *Florida*, 313 U. S. 69, 79."

cial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State."

In civil cases, also, this Court has held that a judicial decree or judgment is governmental action which is subject to the standards and limitations of the due process clause, with regard to both procedural and substantive matters. Thus, a judgment is held to be "State" action in violation of due process where the court did not have jurisdiction over the subject matter or over the parties,[29] or where the notice and opportunity to be heard were insufficient.[30] And if a judgment which was acquired in violation of due process in another jurisdiction is sought to be enforced, either in a State court [31] or in a Federal court,[32] the court's exten-

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[29] In *Scott* v. *McNeal*, 154 U. S. 34, a probate court had, after public notice, appointed an administrator of Scott's estate. Scott had been absent and not heard from for over 7 years, but was actually then alive. Pursuant to court order, the administrator sold Scott's land at public auction, and the sale was confirmed by the probate court. Scott later sued the subsequent grantee of the land. The State court directed a verdict for the defendant on the basis of the prior probate proceedings and sale. *Held:* Reversed; the State court's judgment giving effect to the probate court's decree deprived Scott of his property in violation of the due process clause, whose "prohibitions extend to all acts of the State, whether through its legislative, its executive, or its judicial authorities" (at p. 45). See also *Pennoyer* v. *Neff*, 95 U. S. 714.

[30] *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673. At p. 680 this Court said: "The federal guaranty of due process extends to State action through its judicial as well as through its legislative, executive or administrative branch of government."

[31] *Old Wayne Mutual Life Assn. of Indianapolis* v. *McDonough*, 204 U. S. 8 (Pennsylvania judgment obtained without the notice required by due process of law held not entitled to full faith and credit in Indiana. At p. 23, this Court said: ". . . the act of the Pennsylvania court in rendering the judgment must be deemed that of the State within the meaning of the Fourteenth Amendment. . . . .)"

[32] *Griffin* v. *Griffin*, 327 U. S. 220 (New York judgment obtained without the notice required by due process of law held not entitled to full faith and credit in the District of Columbia). At p. 229, this Court said: ". . . . due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process. Restatement of Judgments, sec. 11, Comment c." That Federal

sion of full faith and credit to that judgment would itself constitute governmental action in violation of the due process clause of the Fourteenth and of the Fifth Amendments, respectively. Judicial action in misapplying the judicial principle of *res judicata* has in several instances been held to be State action in violation of the due process clause.[33] Particularly analogous are the cases in which lower courts had, upon the request of employers seeking to protect alleged "property rights," granted injunctions against peaceful picketing. In *American Federation of Labor* v. *Swing*, 312 U. S. 321, the State court issued the injunction on the ground that peaceful picketing was unlawful under the State's common law policy. This Court, stating that "our concern is with the final decree of the appellate court" (p. 324), held that the injunction constituted "State" action in violation of the Fourteenth Amendment (pp. 325-326). In *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769, this Court held that a similar State court injunction violated the due process clause of the Fourteenth Amendment. And in *Cafeteria Union* v. *Angelos*, 320 U. S. 293,

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courts must meet the same standards as State courts with respect to due process is indicated by this Court's citation of comment c, section 11, of the Restatement of Judgments, the relevant language of which relates specifically only to State Judicial action and the 14th Amendment.

[33] In *Postal Telegraph Cable Co.* v. *City of Newport*, 247 U. S. 464, 476, the judgment of a State court holding that a prior judgment against one not a party or in privity with a party therein was *res judicata*, was held to be "State" action which disregards "the requirement of due process." In *Hansberry* v. *Lee*, 311 U. S. 32, 41, a racial restrictive covenant had been upheld in a prior collusive suit in Illinois between owners of some of the restricted lots. Later, other persons not parties to that suit contested the validity of the restrictive covenant. The Supreme Court of Illinois, holding the first suit was a "class suit," held the first judgment to be *res judicata*. This Court reversed, holding that the prior suit was not a proper class suit, "and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require." See also *United States* v. *Pink*, 315 U. S. 203, 232-233 (1942) (referring to court's denial of relief as "state action").

this Court held that "injunctions sanctioned by the New York Court of Appeals exceeded the bounds within which the Fourteenth Amendment confines State power" (p. 294). See also *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287, 294, 297, 298.

The principle that the actions of the Government through any of its arms are subject to the limitations of the Constitutional requirements of due process has also been applied to executive agencies of the Government,[34] and even to administrative officers of the Government who act beyond, but under color of, their governmental authority.[35]

The language of this Court in *Hovey* v. *Elliott*, 167 U. S. 409, 417-418, involving decrees by the court of the District of Columbia holding a defendant in contempt for not paying over certain moneys and ordering that his answer in a chancery suit be stricken and that a decree *pro confesso*

[34] *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 35-36 (State board of assessment "represents the State, and its action is the action of the State. The provisions of the Fourteenth Amendment are not confined to the action of the State through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the State acts, and so it has been held that, whoever by virtue of public position under a State government, deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name of the State and for the State, and is clothed with the State's powers his act is that of the State. *Chicago, Burlington & Quincy R. R.* v. *Chicago*, 166 U. S. 226.") *Mooney* v. *Holohan*, 294 U. S. 103 ("The due process clause of the Fourteenth Amendment governs any action of a State through its legislature, its courts, or its executive officers, including action through its prosecuting officers.")

[35] *United States* v. *Classic*, 313 U. S. 299, 326; *Screws* v. *United States*, 325 U. S. 91, 110, *cf.* 141. Any doubt as to whether unauthorized action of State officials is to be deemed the action of the State subject to the Fourteenth Amendment entirely disappears when "the judicial power of the State has been exerted in justifying" the action, *Iowa-Des Moines Bank* v. *Bennett*, 284 U. S. 239, 246, when "the highest court of the State confirms such action and thereby makes it the law of the State . . . as the ultimate voice of state law." *Snowden* v. *Hughes*, 321 U. S. 1, 17 (Justice Frankfurter, concurring).

be entered against him, is particularly applicable to this case:

> "Can it be doubted that due process of law signifies a right to be heard in one's defence? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? *If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution.* If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice courts possess the right to inflict the very wrongs which they were created to prevent." (Emphasis supplied.)

(4) LEGISLATIVE RACIAL RESTRICTIONS COMPARED TO JUDICIAL ENFORCEMENT OF RACIAL RESTRICTIVE COVENANTS.

Ironically, although it would be unconstitutional for a legislature to enact a statute imposing racial restrictions on land use, yet the wholesale and extensive imposition of these racial restrictive covenants has a more drastic effect than any legislative zoning statute. Through legislative control, even with all of its evils, it would at least have been possible to provide some sort of planned expansion of areas predominantly occupied by Negroes or other ethnic groups living in overcrowded or slum conditions. But the creation by individuals of racial restrictive covenants ordinarily takes no broader view than that dictated by racial prejudice. Furthermore, a statute may be, and frequently is, repealed or modified to accommodate changed

conditions, or in response to changing concepts resulting from education. Most racial restrictive covenants, however, including the 1906 covenant here involved, purport to be *perpetual* restrictions, fossilizing eternally the prejudice pattern of a passing historical moment. In addition, legislative restrictions, subject to public scrutiny and opposition by the entire community, are imposed by public officials who are at least presumably responsible to the community. Racial restrictive covenants, however, are imposed by persons who are not responsible to the community and who neither represent those restricted nor desire to represent them. Moreover, under legislative zoning, the individuals who are opposed to a given restriction at least have the possibility of abolishing the restriction by trying to elect a majority of the legislature which would do so. In the case of racial restrictive covenants, however, suits are often instituted by only one or merely a few persons to dispossess others from their property and homes even though the majority of neighboring property owners in the area either oppose the initiation of such a suit,[36] or have affirmatively agreed to remove the restriction.[37] The use of the government's power, through the courts, to enforce this private zoning and to deprive other individuals of their fundamental rights to dispose of their own property or to acquire and occupy that property as their home, is thus more arbitrary than judicial enforcement of racial zoning pursuant to the admittedly unconstitutional and vicious legislative zoning statutes. Hence, judicial action enforcing a mere private covenant effects a form of racial zoning more iniquitous

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[36] The majority of neighboring property owners opposed the initiation of the notorious *Garber* v. *Tushin* restrictive covenant suit in the Circuit Court of Montgomery County, Maryland (Equity No. 12894, filed April 11, 1947). See *The Evening Star*, Washington, D. C., page A-14, Sept. 13, 1947; *The Washington Post*, page 3, Sept. 17, 1947.

[37] St. Clair Drake and Horace Cayton, "Black Metropolis," p. 185 (1945).

than the plainly unconstitutional racial zoning by legislation. Legislative racial restrictions have no relevancy to public health, safety, morals or general welfare. *Buchanan* v. *Warley*, 245 U. S. 60, 74-75, 81-82. The judicial enforcement of racial restrictive covenants is certainly in no better position. If legislative racial restrictions are invalid—as they admittedly are—then the judicial enforcement of racial restrictive covenants is equally invalid.

(5) ASSUMED CASES SHOWING UNCONSTITUTIONALITY OF JUDICIAL ENFORCEMENT OF BOTH RACIAL RESTRICTIVE COVENANTS AND RACIAL ZONING STATUTE.

From the standpoint of unconstitutionality, however, there is indeed no difference between the judicial enforcement of a racial zoning statute and the judicial enforcement of a racial restrictive covenant. Both involve the application of law by government to achieve the same result. This can be illustrated by the following pattern of cases in which, let us assume, the following facts and law exist in the City of A, in the State of B, one of the United States, wherein reside whites and Negroes:

(a) *Facts:* The legislature enacts a statute zoning certain areas, some for occupancy only by whites and some for occupancy only by Negroes. The statute provides civil and criminal penalties and authorizes *inter alia* enforcement by injunction in a suit by any white or Negro living in a zoned area against a defendant of the other race, occupying premises in violation of the statute. *Decision:* In such an injunction suit, the judgment should be for the defendant, following *Buchanan* v. *Warley*, 245 U. S. 60.

(b) *Facts:* Now let us assume that there is no statutory law on the subject. However, a white person sues in an equity court to enjoin a Negro from occupying a residence in a block in which all of the other residences are occupied by whites, on the ground that under the state's common

law, it is an abatable nuisance for the races to mix, and that such nuisance arises whenever a Negro seeks to reside in a city block occupied only by whites or vice versa. *Decision:* Judgment should be for the defendant, since if an injunction were granted to abate such an alleged "nuisance", the Court would be recognizing and enforcing a law equally defective on constitutional grounds with the statute assumed in case (a).[38] Comparable decisions are: *Spencer Chapel Methodist Episcopal Church* v. *Brogan,* 104 Okla., 123, 231 Pac. 1074, 1076 (1924) (Lower court enjoined as a *nuisance* the rebuilding, in a mixed Negro-white neighborhood, of a Negro church which had burned; reversed on appeal because "A court of equity will not lend its aid to such an undertaking . . . contrary to law, equity and good conscience"; *Crist* v. *Henshaw,* 196 Okla. 168, 163 Pac. (2d) 214 (1945) (suit to enjoin white owners from selling land to Negroes for Negro occupancy on ground that such occupancy would create a nuisance and destroy market value of plaintiff's land; *held,* "for a court to restrict such sales" would violate the Fourteenth Amendment).

(c) *Facts:* Assume case (a) except that the zoning statute provides that a Negro may occupy a residence in a white zone only on the written consent of the majority of the persons of the opposite race inhabiting that zone (and vice versa). *Decision:* Judgment should be for the defendant here, following *Harmon* v. *Tyler,* 273 U. S. 668, reversing *Tyler* v. *Harmon,* 158 La. 439, 104 So. 200; *ibid.,* 160 La, 943, 107 So. 704.

(d) *Facts:* Assume case (b), except that the nuisance is regarded to arise as a matter of common law whenever a

[38] It is settled that whether a law is enacted by affirmative legislative action or is "recognized" as a part of the common law by the state court, it is subject to the limitations of the due process clause of the Constitution. See Part I A, (3) of this brief.

majority of the people of the opposite race residing in a block refuse to consent to the defendant's residence in such block. *Decision:* Since such a rule of common law is substantially the same as the statutory law supposed in case (c), and for the same reasons involved in case (b), it also should represent a constitutional violation.

(e) *Facts:* Property owners in a block agree to divide the block into two areas, one to be occupied solely by whites and the other solely by Negroes. The legislature enacts a statute confirming the agreement, and providing criminal penalties and enforcement by injunction in a suit by any white or Negro living in the zoned area against a defendant of the other race, occupying premises in violation of the agreement. *Decision:* In such an injunction suit, the judgment should be for defendant, following *Buchanan* v. *Warley*, 245 U. S. 60, and *Harmon* v. *Tyler*, 273 U. S. 668. A comparable case is *Liberty Annex Corp.* v. *City of Dallas*, 289 S. W. 1067, affirmed 295 S. W. 591, 19 S. W. (2d) 845 (Texas) (suit to enjoin enforcement of ordinance which confirmed a private segregation agreement and declared unlawful the residence by Negroes in white area, and vice versa. *Held:* Ordinance violates constitutional due process, following *Buchanan* v. *Warley*).

(f) *Facts:* An owner of a block subdivides it and inserts a restrictive covenant in each deed against occupancy of every lot by Negroes. The equity court denies enforcement on the ground that the restrictive covenant is against the public policy of the jurisdiction. At its next session, the legislature enacts a statute which declares that such restrictive covenants do not violate the state's public policy and expressly authorizes enforcement of them by injunction. *Decision:* Such an injunction should be denied under *Buchanan* v. *Warley* and *Harmon* v. *Tyler* since there is no difference between legislation affirmatively fixing racial

residential zoning and legislation affirmatively approving private racial residential zoning enforceable in the courts.

(g) *Facts:* As in case (f), an owner of a block subdivides it and inserts a restrictive covenant in each deed against occupancy of every lot by Negroes. This is essentially the cases at bar. *Decision:* The recognition by a court of equity that under the common law of the state such a covenant runs with the land and creates rights in favor of persons not parties to that covenant and against persons not parties to it, which can be enforced by injunction, in no real respect differs on constitutional grounds from any of the foregoing cases. No court should issue an injunction in a suit seeking to oust a Negro who has purchased and occupies one of the lots.

(6) THE PETITIONERS HAVE NOT ATTEMPTED TO CONTRACT AWAY THEIR CONSTITUTIONAL RIGHTS.

Urciolo and all of the grantees have the right, protected by statutes [39] and by the Constitution,[40] to acquire, use and dispose of property without discrimination based on race. There is no question here involved of whether Urciolo or any of the grantees may have attempted to "contract away" their constitutional rights with reference to their property. The fact is that neither Urciolo nor any of the grantees has been a party to any such contract. The deed restriction here involved was created about 1906. Even if it be deemed a contract between the person originally imposing the cov-

[39] Secs. 1977 and 1978, Rev. Stats., 8 U.S.C. secs. 41, 42.

[40] *Buchanan* v. *Warley*, 245 U. S. 60, 74: "Property . . . includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property." In the *Civil Rights Cases*, 109 U. S. 3, 22, this Court said that sections 1977 and 1978, Rev. Stats., 8 U.S.C. secs. 41, 42, declare "fundamental rights which are the essence of civil freedom . . . which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery."

enant and his grantee, neither of them had any authority or right to contract away the rights of *other persons* to own, occupy, and dispose of the property. No subsequent grantee of the land became a *party* to any such contract by his purchase, nor thereby "contracted away" his constitutional and other rights in the land. At best, he could only be said to buy the land *subject to a burden.*

The question, thus, is not one of "contract", but whether the personal wish of the 1906 covenantor, that no person of a particular racial group should thereafter buy and occupy the land, is the kind of burden which the judicial arm of government may validly impose on all people who may thereafter buy the land, irrespective of their wishes in the matter. The burden here involved is utterly different from other types of burdens on land which may validly be imposed. See Part VII of this Brief. The fact that the 1906 covenantor and his grantee signed a sheet of paper while consummating a bargain and sale between themselves could not and should not create any authority or right to invoke the power of the Government to bind millions of people to a scheme which would discriminate against them solely because of their race. Judicial enforcement of the covenant would (a) violate rights guaranteed by the Constitution and by statute to both sellers and buyers of the property, (b) be contrary to public policy, (c) be inconsistent with treaty obligations, (d) be repugnant to principles of equity, and (e) unduly restrict the alienability of property. In these circumstances, the "burden" which the covenantor sought to impose on the land cannot and should not be deemed the type of "burden" which may validly be enforced by the judiciary. *Cf.*, Justice Holmes in *Norcross* v. *James*, 140 Mass. 188, 191-3, 2 N. E. 946, 948-9.

(7) JUDICIAL ENFORCEMENT OF RACIAL RESTRICTIVE COVENANTS IS UNCONSTITUTIONAL.

It thus is plain that since both the legislature and the court act as arms of Government, with the authority of the sovereign, racial restrictions which the Government may not constitutionally impose through its legislature are equally forbidden to the Government acting through its courts.[41] The circumstance that this governmental action is initiated by an individual, is obviously immaterial. For in many of the above-cited cases, wherein this Court held court action violative of the due process clause, the action was initiated by individuals.

It is particularly noteworthy that the ordinance involved in *Harmon* v. *Tyler*, 273 U. S. 668, prohibited Negroes from establishing residence in a white community, and whites from establishing residence in a Negro community, only if the persons involved had not secured "the written consent of a majority of the persons of the opposite race inhabiting such community or portion of the city." Exclusion thus depended on the private wishes of the individuals who constituted a majority of the opposite race. Nevertheless, when a suit was brought to enjoin an owner of a cottage in a white community from leasing to Negro tenants without obtaining the consent of a majority of the white persons in the community, this Court unhesitatingly held that the issuance of such an injunction would be in violation of the due process clause of the Constitution.[42] The attempt to deny

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[41] *Hovey* v. *Elliott*, 167 U. S. 409, 417-418 (". . . the judicial department . . . [does not have] the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution."); *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78 ("And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.").

[42] The *Harmon* case thus demonstrates, as does *Buchanan* v. *Warley*, the irrelevancy of the argument that since Negroes are free to covenant

the rights of Negroes in the *Harmon* case rested on individual action predicated on statute law. In the cases at bar, this attempt rests on individual action predicated on judge-made law.

Under the decisions of this Court in the *Buchanan*, *Harmon*, and *City of Richmond* cases, the legislature is forbidden by the Constitution to grant to neighboring property owners the power to obtain a court decree which would deprive a landowner of his right to sell his property to whomever he desires, and which would deprive any person of his right to acquire real property for residential use and occupancy, solely on the basis of the race of the purchaser. If the power to obtain such a court decree cannot be conferred by the legislature upon neighboring property owners, the Constitution equally prohibits a court from granting such power to them through the development and application of nonstatutory rules of law. As Justice Edgerton remarked in his dissenting opinion in the court below (162 F. (2d) 233, 241; R. 427):

> "The expressed will of a former property-owner cannot authorize the court to deny a right which the expressed will of a legislature could not authorize it to deny."

The difference between infringement of constitutional guarantees through the legislature and infringement through the judiciary is particularly meaningless where, as here, the court involved is a Federal District Court, since its powers to grant equitable relief are exclusively derived

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their property against purchase and occupancy by whites, Negroes have no complaint against the enforcement of restrictive covenants made by white persons. Further, this specious contention ignores the fact that ". . . the essence of the constitutional right is that it is a personal one". *Buchanan* v. *Warley*, 245 U. S. 60, 80; *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 161-62; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 351; *Mitchell* v. *United States*, 313 U. S. 80, 97.

from Acts of Congress. Judicial Code, Sec. 24, 28 U.S.C., Sec. 41 (1); 11 D.C. Code (1940), Secs. 305, 306. The District Court has no powers beyond those given it by Congress, and therefore cannot achieve results which the Constitution forbids Congress itself to achieve. *Cary* v. *Curtis*, 44 U. S. (3 How.) 236, 245; *Myers* v. *United States*, 272 U. S. 52, 130; Felix Frankfurter and Nathan Greene, "The Labor Injunction," pp. 208-209 (1930).

Judge Ross clearly probed the heart of the question in the first reported case involving a racial restrictive covenant. *Gandolfo* v. *Hartman*, 49 Fed. 181, 182, 183:

> "It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while State and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the State may lawfully do so by contract, which the Courts may enforce. Such a view is, I think, entirely inadmissible. Any result inhibited by the Constitution can no more be accomplished by contract of individual citizens than by legislation, and the court should no more enforce the one than the other . . . But the principle governing the case is, in my opinion, equally applicable here, where it is sought to enforce an agreement made contrary to the public policy of the government, in contravention of one of its treaties, and in violation of a principle embodied in its Constitution. Such a contract is absolutely void, and should not be enforced in any court,—certainly not in a court of equity of the United States."

(8) THE CONTENTIONS HERE URGED ARE NOT NOVEL LEGAL DOCTRINES. THEY HAVE BEEN APPLIED BY THIS COURT IN NUMEROUS PRIOR CASES IN OTHER CONTEXTS.

The contention here urged that the enforcement of racial restrictive covenants by judicial decree is unconstitutional

rests on settled legal doctrines. This Court has thrice held legislative racial zoning unconstitutional—this case involves governmental action which achieves precisely the same end through the judiciary. This Court has held that the judiciary as well as the legislature is subject to the due process clause—this case involves judicial action effecting a result which this Court has held to be in violation of due process. This case is of narrow legal compass because it involves a conjunction of *three* special elements: (a) the District Court is accomplishing that which if done under express legislative sanction would be unconstitutional, *AND* (b) the restriction is being applied to persons who have never attempted to contract away their constitutional rights, *AND* (c) the restriction is based solely on race.

Furthermore, this Court has already, in other contexts, recently rendered decisions indicating that constitutional rights are not to be denied through court action at the behest of private parties seeking to utilize governmental power to effect a result which the legislature itself could not constitutionally effect. Thus in *Marsh* v. *Alabama*, 326 U. S. 501, 505, this Court held that since "all those owners together could not have set up a municipal government with sufficient power to pass an ordinance completely barring" the exercise of the constitutional right, the totality of private ownership of the town could not exercise power, enforceable in the courts, to abridge such constitutional right. In *Smith* v. *Allwright*, 321 U.S. 649, this Court held that a State, which may not by legislation constitutionally deprive Negroes of the right to vote, may not achieve the same end through the medium of private political parties. In *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192,203, this Court held that a private union acting as bargaining representative under the authority of federal law may not

make binding contracts discriminating among members of the craft which are not based on relevant differences, and that "discriminations based on race alone are obviously irrelevant and invidious."

In *A. F. of L.* v. *Swing*, 312 U.S. 321, this Court expressly held that a court injunction against peaceful picketing, based on the State's common law policy, was as unconstitutional as was the statute against peaceful picketing in *Thornhill* v. *Alabama*, 310 U. S. 88. The cases at bar (involving a court injunction against sale and occupancy of land solely because of race) are no different from the *Buchanan*, *Harmon*, and *City of Richmond* cases (holding that statutes forbidding sale and occupancy of land solely because of race were unconstitutional) than *A. F. of L.* v. *Swing* was different from *Thornhill* v. *Alabama*.

The present case, therefore, plainly falls within the scope of previous decisions of this Court. It involves no extension into new fields of law; it merely applies settled law to a practice used to evade the force of this Court's decisions holding racial zoning unconstitutional.

B. THE ENFORCEMENT OF RACIAL RESTRICTIVE COVENANTS HAS DRASTICALLY CURTAILED THE ABILITY OF NEGROES TO SECURE ADEQUATE HOUSING AND HAS HEMMED THEM INTO SLUMS AND GHETTOES. THE COVENANTS HAVE BEEN A DIRECT AND MAJOR CAUSE OF ENORMOUS OVERCROWDING IN THE FEW AREAS AVAILABLE TO NEGRO RESIDENTIAL OCCUPANCY, WITH CONSEQUENT SUBSTANTIAL INCREASE IN DISEASE, DEATH, CRIME, IMMORALITY, JUVENILE DELINQUENCY, RACIAL TENSIONS, AND ECONOMIC EXPLOITATION FROM ARTIFICIALLY INFLATED RENTAL AND HOUSING COSTS. THEY CONSTITUTE A DIRECT DANGER TO OUR NATIONAL UNITY. IN THE LIGHT OF THESE EFFECTS AND CONDITIONS, THE JUDICIAL ENFORCEMENT OF RESTRICTIVE COVENANTS IS CLEARLY INCOMPATIBLE WITH THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

During the past two decades, racial restrictive covenants have been extensively and uniformly imposed in most of the major cities of the nation on a large percentage of all newly constructed dwellings, new residential subdivisions, and existing residential properties contiguous to areas occupied by Negroes.[43] This private, and wholesale, "zoning" has hemmed Negroes into virtual ghettoes by placing artificial yet impassable boundaries—iron rings in depth—around the existing areas of Negro occupancy, and barring Negroes of all income groups from occupancy in most suburban areas where new construction has been concentrated. The lack of sufficient space for decent living and normal expansion which has resulted largely from these

[43] "To Secure These Rights", The Report of the President's Committee on Civil Rights, pp. 68, 91. (Govt. Printing Off. 1947).

restrictions on the housing market and the increased urbanization of the Negro population have forced Negroes to "double-up" in excessively crowded dwellings and in congested neighborhoods; they have been grossly exploited by enormously inflated rents and selling prices; and the blighted slum areas into which they have been forced have, by virtue of such overcrowding, become further deteriorated.

This enforced living in slums has had universally known baneful effects upon the economic, social and moral life, not only of the Negroes, but also of the entire community.

This nation-wide condition is mirrored in the District of Columbia. The Negro population within the District has doubled since 1930. There are now about 260,000 Negroes in the District, constituting about 30% of its total population.[44] The inferiority of housing occupied by Negroes as compared with housing occupied by whites in the District is notorious.[45] Negroes as a group disproportionately occupy dwellings lacking the elementary requisites for decent living, are compelled to crowd large families into small subdivided apartments and rooms, and live in the oldest, most densely populated parts of the city with inadequate sunlight and play space. In its July, 1947, report on city planning, the Washington Board of Trade estimated that 70% of the population of the District's three major

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[44] Negroes within the District of Columbia:

Date	*Number*	*Percent of Population*
1930 U. S. Census	132,068	27.1%
1940 U. S. Census	187,266	28.2%
1947, estimate based on U. S. Census survey.	About 260,000	About 30%

[45] See, *e. g.*, Washington, D. C. Council of Social Agencies, "Social Survey—Report on Racial Relations", November, 1946; Agnes E. Meyer, *Negro Housing, Capital Sets Record for U. S. in Unalleviated Wretchedness of Slums*, The Washington Post, Section II, pp. 1B and 6B (February 6, 1944); 16th U. S. Census (1940), *Housing*.

slum areas are Negroes.[46] This is due largely to restrictive covenants.

(1) THE NEGRO POPULATION IS BECOMING INCREASINGLY URBANIZED

In 1900, the Negro population of the United States was still largely rural. Only 2 million Negroes then lived in cities.[47] Since then the Negro population has rapidly moved to the cities, with most of the increase concentrated in industrial cities already having sizable Negro populations.[48] The following tables[49] reflect the urbanization of the Negro population:

INCREASE IN NEGRO URBAN POPULATION IN THE UNITED STATES

	1910	1920	1930	1940
Number of Negroes urbanized	2,684,797	3,559,473	5,193,913	6,253,588
Percentage of Negroes urbanized	27.3	34.0	43.7	48.6
Percentage of total United States population urbanized	45.8	51.4	56.2	56.5

INCREASE IN NEGRO POPULATION IN TEN LEADING INDUSTRIAL CITIES

City	1910		1920		1930		1940	
	Number of Negroes	% of total pop.	Number of Negroes	% of total pop.	Number of Negroes	% of total pop.	Number of Negroes	% of total pop.
New York	91,709	1.9	152,467	2.7	327,706	4.7	458,444	6.1
Chicago	44,103	2.0	109,458	4.1	233,903	6.9	277,731	8.2
Philadelphia	84,459	5.5	134,229	7.4	219,599	11.3	250,880	13.0
Detroit	5,741	1.2	40,838	4.1	120,066	7.7	149,119	9.2
Cleveland	8,448	1.5	34,451	4.3	71,899	8.0	84,504	9.6
St. Louis	43,960	6.4	69,854	9.0	93,580	11.4	108,765	13.3
Pittsburgh	25,623	4.7	37,725	6.4	54,983	8.2	62,216	9.3
Cincinnati	19,639	5.1	30,079	7.5	47,818	10.6	55,593	12.2
Indianapolis	21,816	9.3	34,678	11.0	43,967	12.1	51,142	13.2
Kansas City, Mo.	23,556	9.5	30,719	9.5	38,574	9.8	41,574	10.4

[46] Washington Board of Trade, "City Planning", July, 1947; "Washington—A Plan for Civic Improvements, 1947" (Report prepared for Commissioners of the District of Columbia by Citizens Planning Committee, May 15, 1947) p. 98.

[47] T. J. Woofter, Jr., "The Status of Racial and Ethnic Groups," in *Recent Social Trends in the United States*, ch. 11, p. 567 (1933).

[48] See T. J. Woofter, Jr., *Negro Problems in Cities*, ch. II (1928).

[49] U. S. Census data for 1910, 1920, 1930, and 1940. See also Harold I. Kahen, "Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem," 12 U. of Chi. L. Rev. 198-202 (February 1945).

Particularly significant is the percentage of change, by color, of the populations of fourteen important cities during the period from 1930 to 1940. In each city the Negro population increased greatly whereas the total population either declined or increased at a much smaller rate.

PERCENT OF POPULATION CHANGE, TOTAL AND NEGRO IN SELECTED CITIES: 1930 to 1940 (From U. S. Census Reports)

City	Total population	Negro population
New York	7.6	38.9
Chicago	.6	18.7
Philadelphia	−1.0	14.2
Detroit	3.5	18.3
St. Louis	−.7	16.2
Cleveland	−2.5	17.5
Pittsburgh	.3	13.2
Cincinnati	1.0	16.3
Indianapolis	11.8	16.3
Los Angeles	21.5	64.0
Newark, N. J.	−2.8	17.7
Columbus	5.3	9.1
Gary	11.2	13.8
Dayton	4.8	18.7

Even more significant is the fact that the movement of Negroes to urban areas was further accelerated after 1940, as illustrated by the following data:

POPULATION GROWTH, BY COLOR, IN SELECTED CITIES: 1940 to 1945 OR 1946*

City	White		Negro		Percentage of Increase: 1940 to 1945 or 1946	
	April 1940	1945–46	April 1940	1945–46	White	Negro
Los Angeles	1,406,430	1,654,866[a]	63,774	133,082[a]	17.7	108.7
San Francisco	602,701	772,354[b]	4,846	32,001[b]	28.1	560.4
Oakland	287,936	358,067[c]	8,462	37,327[c]	24.4	341.1
San Diego	196,946	347,594[d]	4,143	13,136[d]	76.5	217.1
Long Beach	162,582	235,602[e]	610	3,659[e]	44.9	499.8
Pasadena	76,737	91,099[f]	3,929	6,326[f]	18.7	61.0

*Special Census titled *Race, Sex, by Census Tracts*, U. S. Census Bureau:

a. As of January 28, 1946
b. As of August 1, 1945
c. As of October 9, 1945
d. As of February 21, 1946
e. As of January 24, 1946
f. As of April 26, 1946

These statistics of Negro urbanization indicate that Negroes have come, and probably will continue to come, and remain, in the cities of the Nation in large numbers.

They come largely because expanding assembly-line industry, no longer able to get workers through immigration, recruits them for its labor force. Space and housing are obviously required for their shelter.

(2) COMMUNITY DISORGANIZATION RESULTING FROM RESTRICTIVE COVENANTS

Restrictive covenants have been, in the cities, a prime factor contributing to the social disorganization of both the Negro people and the entire community. They have corrupted family life by promoting excessive density and congestion in ghetto-like communities of substandard houses. They have burdened Negroes with excessive housing and rental costs. Disease, infant mortality, insanity, crime, juvenile delinquency, and family discord have been disproportionately stimulated by the effects of restrictive covenants. The covenants have been a direct cause of increased racial tensions and race riots. And they have provided the basic structure for other forms of segregation and discrimination in schools, health and welfare services, police protection, sanitation, and other municipal facilities, with consequent inefficiency and lowered standards for all. The "positive correlation between segregation [of Negroes] and tuberculosis mortality, amount of overcrowding, percentage of housing needing major repairs, infant mortality" etc., has been amply proven.[50]

Although the residential segregation of Negroes and its deleterious effects are not due wholly to any one force, it is abundantly clear that racial restrictive covenants are a major cause thereof. The President's Committee on Civil Rights has stated that "the restrictive covenant has become the most effective modern method of accomplishing

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[50] See Julius Jahn, Calvin F. Schmid, and Clarence Schrag, "The Measurement of Ecological Segregation," 12 American Sociological Review 293, 302-303 (June, 1947).

such segregation" and is the "chief weapon in the effort to keep Negroes from moving out of overcrowded quarters."[51] Judicial decisions have recognized that this is the purpose and effect of restrictive covenants. In *Grady* v. *Garland*, 67 App. D. C. 73, 89 F. (2d) 817, 819, the Court of Appeals for the District of Columbia stated: "A mere glance at the present situation demonstrates . . . the restriction . . . furnishes a complete barrier against the eastward movement of colored population into a restricted area—a dividing line." Justice Edgerton, dissenting in the court below in the cases at bar (162 F. (2d) 233, 244) (R. 430) stated:

> "Covenants prevent free competition for a short supply of housing and curtail the supply available to Negroes . . . Exclusion from decent housing confines Negroes to slums to an even greater extent than their poverty makes necessary. Covenants exclude Negroes from a large fraction—no one knows just how large—of the decent housing in the District of Columbia. Some of it is within the economic reach of some of them. Because it is beyond their legal reach, relatively well-to-do Negroes are compelled to compete for inferior housing in unrestricted areas, and so on down the economic scale. That enforced housing segregation, in such circumstances, increases crowding, squalor, and prices in the areas where Negroes are compelled to live is obvious. It results in "doubling up," scandalous housing conditions for Negroes, destroyed home life, mounting juvenile delinquency, and other indications of social pathology which are bound to have their contagious influence upon adjoining white areas.' "

The importance of restrictive covenants in limiting the land space available for use by Negroes has been widely recognized by housing and city planning authorities. John B. Blandford, Jr., the first administrator of the National

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[51] "To Secure These Rights", The Report of the President's Committee on Civil Rights, pp. 68, 91, 145, 169, 171 (Govt. Printing Off., 1947).

Housing Agency, stated that "the problems of site selection and racial restrictive covenants" are "barriers which exist even for the Negro citizen who can pay for a home, and, if permitted, could raise a family in decent surroundings."[52] The Commissioner of the Federal Public Housing Authority, pointing to "the desperate straits of minority groups," stated: "You cannot consign large masses of people to limited and tightly bound areas without deplorably affecting our nation's well-being. Space and more space is sorely needed for these people."[53] Wilson W. Wyatt, when National Housing Expediter and Administrator of the National Housing Agency, stated:[54]

> "The Federal Government, of course, has a deep concern in the elimination in this country of all discrimination, including restrictive covenants, for reason of race, creed, color or national origin. We have said before and I am glad to go on record again that every effort will be made to assure veterans of all minority groups equal consideration under the Veterans Emergency Housing Program. Yet we are well aware that emergency methods cannot solve the problem of adequate housing for our minority groups. . . . All of us know that because of neighborhood resistance and

[52] John B. Blandford, Jr., "The Need for Low-Cost Housing", Address before the Annual Conference of the National Urban League, Columbus, Ohio, October 2, 1944, p. 1 of mimeographed copy. Mr. Blandford added: "We met troubles from the start of the war housing job, but they were multiplied every time we tried to build a project open to Negroes. These difficulties—of site selection, of obtaining more 'living space'—were deep-rooted and had to be overcome one by one. And delays only made more desperate the plight of both those who migrated to take war jobs and those already living in war industry centers . . . housing available to Negroes was already crowded . . . simply could not absorb newcomers in the volume that appeared."

[53] "Phillip M. Klutznick Resigns as FPHA Commissioner," Journal of Housing (July, 1946).

[54] Letter to the Conference for the Elimination of Restrictive Covenants, held in Chicago, May 10-11, 1946, quoted in Proceedings of the Conference, etc., p. 4.

restrictions upon the use of land, new home sites—one of the keys to the problem—often are difficult to acquire for minority groups. During the war these restrictions too many times delayed or completely blocked private and public efforts to produce essential housing for minority group war workers."

The National Housing Agency's Conference on October 28 to Nov. 2, 1946, stated:[55]

"Land or 'living space' is a crucial need. Because of racial restrictive covenants and other discriminatory practices, heavy concentrations of Negroes in limited areas are typical in communities where there are large proportions of Negro population. In usual patterns of urban growth, congestion is relieved somewhat by decentralization in which people move to outlying areas. Not so with Negroes. Thei mobility is sharply limited. In a market where racial discrimination is practiced, their choice is restricted. Segregation patterns become hard and fast. Even city planners tend to adopt existing patterns of population density and segregation. The results are market distortions and wasteful expenditures.

"Large scale builders indicate that even where contractors appreciate the market for privately financed housing among Negroes and have adequate financing resources readily available, they are often stymied by lack of unrestricted or unopposed building sites."

The Mayor's Conference in Chicago on City Planning in Race Relations (1944)[56] concluded that "At present Negroes are confined to restricted areas with bad houses and exorbitant rents. They are confined to these districts

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[55] National Housing Agency, Summary and Digest of the Orientation Conference for Racial Relations Advisers, pp. 6-7 (October 28-Nov. 2, 1946).

[56] City of Chicago, City Planning in Race Relations, Proceedings of the Mayor's Conference on Race Relations, February, 1944.

by an atmosphere of prejudice, and specifically by conspiracies known as restrictive covenants."

The Chicago Housing Authority states:[57] "Outstanding in their need of housing in the emergency group are the Negroes of the city, whose number is estimated at about one-tenth the total population. The conditions of Negro housing—the over-crowdedness, the excessive rents, and the shamefully substandard conditions—have long been a subject of discussion. One of the reasons for the housing plight of the Negroes is restrictive covenants which block the production of new houses for them on vacant land in anything like the number required. These restrictions almost completely prohibit the use by Negroes of vacancies in the existing houses outside their 'ghettoes', and the only areas where Negro housing construction can take place are those already occupied by Negroes."

These views have been repeatedly corroborated by private city planning groups and by others who have studied and had experience with the problem. The following are illustrative: *The American City:* "The prime device for maintaining this stranglehold has been the restrictive covenant."[58] *Architectural Forum:* "Drawn like iron bands around bulging Negro neighborhoods in most Northern cities, race restrictive covenants have been tightened by war housing shortages . . . . Restrictive covenants have bottled Negroes in densely crowded areas, where two out of every three houses are substandard."[59] *Drake and Cayton:*[60] "Restrictive covenants . . . . confine Negroes

[57] "The Tenth Year of the Chicago Housing Authority" (Report for fiscal year ending June 30, 1947). pp. 14, 38.

[58] "Restrictive Covenants Directed Against Purchase or Occupancy of Land by Negroes," *The American City*, p. 103 (May, 1947).

[59] "Good Neighbors", *Architectural Forum*, (January, 1947).

[60] St. Clair Drake and Horace Cayton, "Black Metropolis," pp. 113, 179 (1945); Horace Cayton, "Negro Housing in Chicago", Social Action, p. 12, 26 (April 15, 1940).

to the Black Belt, and they limit the Black Belt to the most run-down areas of the city." *Weaver:* Racial restrictive covenants, "the principal instrument of residential segregation in the North", "facilitate the most excessive exploitation of colored people, occasion over-crowding, and inevitably spell inadequate public and community facilities for residents of the black ghetto."[61] *Sterner:* ". . . segregation is an important factor in causing the poor housing conditions of the Negro urban population . . . the restrictive compact or covenant as a device for enforcing segregation has been widely used in the North."[62]

Comprehensive statistical studies have shown that *at every income level* non-whites receive proportionately more substandard housing, or less housing value for the same price, than do white families who have access to the open housing market, and have proven that:[63]

> "The progressive increase in the ratio of non-white to white occupancy in substandard housing for each succeeding rental bracket from the lowest to the highest clearly indicates that operation of the discriminated housing market, as a factor independent of comparable

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[61] Robert C. Weaver, "Community Action Against Segregation", 13 Social Action 18 (Jan. 15, 1947); Weaver, "Whither Northern Race Relations Committees?", Phylon, (Third Quarter, 1944) p. 211; Weaver, "Race Restrictive Housing Covenants," 20 Journal of Land & Public Utility Economics 183 (Aug., 1944); Weaver, "Housing in a Democracy", 244 Annals of the American Academy of Political and Social Science, 95 (Mar., 1946); Weaver, "Planning for More Flexible Land Use," 23 Journal of Land & Public Utility Economics 29 (Feb., 1947); Weaver, "A Tool for Democratic Housing", Crisis, p. 47 (Feb., 1947).

[62] Richard Sterner, "The Negro's Share," pp. 200, 207 (1943); Gunnar Myrdal, "An American Dilemma, The Negro Problem and Modern Democracy," p. 624 (1944).

[63] C. K. Robinson, Housing Analyst, National Housing Agency, "Relationship Between Condition of Dwellings and Rentals by Race," 32 Journal of Land and Public Utility Economics, 296, 301, 302 (Aug., 1946); Sara Shuman, "Differential Rents for White and Negro Families," Journal of Housing, pp. 167-174 (Aug., 1946).

rent-paying ability, is a major cause for the excessive occupancy of non-whites in substandard housing.

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"The differentials revealed in this analysis may be imputed to the effect of residential racial restrictions. This is supported by the fact that the proportionate differentials between the two racial groups are greatest in the higher rental value brackets where racial restrictive practices operate to maintain a highly discriminatory market . . ."

The District of Columbia is no different in this regard from other cities. The American Veterans Committee, for example, after months of unremitting search for a satisfactory site open to all of its veteran members regardless of race, color, or creed, was forced by the widespread existence of restrictive covenants, to abandon its plans to build a housing project in the District.[64] Uncontroverted testimony before a Senate investigating committee amply demonstrates that restrictive covenants have been instrumental in confining Negroes to slums in the District.[65]

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[64] The Capital Veteran, p. 2 (October, 1947). (Newspaper of American Veterans Committee, Washington, D. C.)

[65] Justice Edgerton, dissenting in *Mays* v. *Burgess*, 79 App. D. C. 343, 147 F. (2d) 869, 877-878, quotes the following testimony, among others, in Investigation of the Program of the National Capital Housing Authority: Hearings before a Subcommittee of the Committee on the District of Columbia, United States Senate, 78th Cong., 2nd sess., on S. Res. 184 and S. 1699 (1944):

"It is generally recognized that there are practically no vacancies today for the Negro citizen of any income level in Washington. Hundreds of Negro war workers and resident families, evicted through no fault of their own, are separated and doubled up in already overcrowded dwellings. . . . The widespread use of restrictive covenants in the District constitutes a distinctive feature which distinguishes the housing problem of Negroes from that of all other racial groups. Confined by these intangible but almost impregnable barriers, Negroes . . . are discriminated against in the housing market by being thus barred from bidding in the open market for

(a) Density, congestion, "piling-up" of Negroes in ghetto slums.

Like most cities, Washington has grown by spreading outward from its business center (at about 13th and F Streets, N. W.) as well as by crowding more people into the older, inner zones. Non-whites (over 99% of non-whites in the District are Negroes) have, however, been crowded far more than whites, as shown by the following table based on the 1940 U. S. Census:

PERCENT OF OCCUPIED DWELLING UNITS HAVING SPECIFIED NUMBERS OF PERSONS PER DWELLING UNIT AND PERSONS PER ROOM, BY TENURE AND COLOR OF OCCUPANTS, FOR THE DISTRICT OF COLUMBIA, 1940

PERSONS PER DWELLING UNIT AND PERSONS PER ROOM	TENURE			
	All dwelling units		Tenant-occupied dwelling units	
	White	Nonwhite	White	Nonwhite
Persons per dwelling unit:[a]				
6 or more	11.6	28.9	9.4	28.7
11 or more	0.9	4.0	1.0	4.1
Persons per room:[b]				
More than 1	14.8	37.9	19.4	43.1
More than 1.5	5.6	18.5	7.9	21.9
More than 2	1.2	5.8	1.7	7.0

[a] Derived from data in table 9 of "Housing—General Characteristics, District of Columbia"; 16th Census of the United States, 1940.

[b] Derived from data in table 10 of "Housing—General Characteristics, District of Columbia," 16th Census of the United States, 1940.

homes." Part 4, pp. 1110-1111; testimony of Mrs. Robert G. McGuire, Chairman, Emergency Committee on Housing in Metropolitan Washington, May 19, 1944.

"The main reason why Negroes have not moved from these congested areas into more adequate neighborhoods is the widespread use of covenants, agreements, and neighborhood resistance to the occupancy by Negroes of undeveloped and developed areas. The effect of these restrictions has been to limit artificially the housing market for Negroes and cause them to pay higher prices for the same or less value and services. This feature makes the housing problem of Negroes distinctive from that of any other racial group." Part 4, p. 1137; testimony of Mrs. Pauline R. Coggs, Chairman, Research Committee of the Emergency Committee on Housing in Metropolitan Washington, May 19, 1944.

The concentration of Negroes in the District in 1940 is vividly illustrated by the correlation between Charts 1 and 2 in the Appendix of this brief showing the distribution in 1940 of Negro population and dwelling units with 1.51 or more persons per room.

In April, 1947, the Census Bureau conducted a sample survey of population and housing in the Washington, D. C. Metropolitan Area, which includes the District and adjacent counties in Maryland and Virginia.[66] The results shown in the following table indicate that the large gap between white and Negro proportions of overcrowding in the District observed in 1940 have remained relatively unchanged.

PERCENT OF OCCUPIED DWELLING UNITS HAVING 6 OR MORE PERSONS PER DWELLING UNIT AND 1.5 OR MORE PERSONS PER ROOM BY COLOR OF OCCUPANTS, FOR WASHINGTON, D. C. METROPOLITAN AREA: 1940 AND 1947

PERSONS PER DWELLING UNIT AND PERSONS PER ROOM	WHITE		NONWHITE	
	1940	1947	1940	1947
Persons per dwelling unit:				
6 or more	12	9	29	23
Persons per room:				
More than 1.5	5	4	18	12

Furthermore, while whites have spread out toward the suburbs, the Negro population has "piled up" in the inner zones of the city. This is shown by the following tables:

[66] Bureau of the Census, Current Population Reports, Housing, Series P-71, No. 1, July 14, 1947.

POPULATION GROWTH BY COLOR AND ZONE OF RESIDENCE, FOR THE DISTRICT OF COLUMBIA: 1930 TO 1940[67]

ZONE OF RESIDENCE	NEGRO			WHITE AND OTHER		
	Population in 1930	Population in 1940	Increase in population: 1930–1940	Population in 1930	Population in 1940	Increase in population: 1930–1940
All zones	132,068	187,266	55,198	354,901	475,825	120,924
I, II, and III (2¼ mile radius from business center)	100,446	138,582	38,136	147,186	168,969	21,783
IV (from 2¼ to 3¼ miles out)	19,212	28,266	9,054	132,472	167,534	35,062
V (from 3¼ miles out to D. C. boundary)	12,410	20,418	8,008	75,243	139,322	64,079
Percent						
All zones	100	100	100	100	100	100
I, II, and III	76	74	69	42	36	18
IV	15	15	16	37	35	29
V	9	11	15	21	29	53

Thus, although the white population was already more "spread out" than the Negro in 1930, the large additional Negro population, during the next ten years, had to be absorbed in the same general areas that Negroes already occupied. More than two-thirds of both the new and the old Negro residents were confined to the already densely populated inner zones of the city. On the other hand, more than four-fifths of the increase in the white population occurred in the two outer zones, where most new residences were constructed and where population density was low.

Particularly significant are the relative proportions of

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[67] Source: Fifteenth and Sixteenth Censuses. The "zones" are roughly concentric circles, and the population of each "zone" consists of the residents of the census tracts which fall chiefly within the area indicated. The zones are composed of the following census tracts:

Zone I—tracts 51, 58;

Zone II—tracts 46-50, 52-54, 57, 59-62, 86;

Zone III—tracts 33-38, 40-45, 55-56, 63-66, 70, 72, 82-83, 85, 87;

Zone IV—tracts 2-7, 23-32, 39, 67-69, 71, 74, 79-81, 84, 88, 91-93;

Zone V—tracts 8-22, 73, 75-78, 89-90, 94-95.

increase of the Negro and white population by zone, shown in the following extract of the above table:

ZONE OF RESIDENCE	PERCENT OF INCREASE IN POPULATION: 1930 to 1940	
	Negro	White
All zones	100	100
I, II, and III	69	18
IV	16	29
V	15	53

Similar but even more pronounced racial differences are apparent in the growth of Washington's suburbs, in the adjoining counties of Maryland and Virginia. As the following table shows, during the period from 1930 to 1940 the total suburban population increased from 21.6% to 27% of the entire metropolitan population, an increase of 82.4% in the suburban population. But the proportion of Negro residents in the suburban population *decreased* from 15.4% to 10.8%. Even more significant in demonstrating the "spreading out" of whites in the suburbs and the "piling up" of Negroes in the District is the fact that the racial population increases during this period *within the District* were 41.8% Negro and 34.1% white whereas the *suburban* increases were 28.2% Negro and 92.2% white.

POPULATION CHANGE, BY COLOR, IN THE DISTRICT OF COLUMBIA AND IN METROPOLITAN WASHINGTON OUTSIDE THE DISTRICT OF COLUMBIA: 1930–1940

AREA AND COLOR	1930		1940		*Percent of increase, 1930–1940
	Number	Percent	Number	Percent	
Metropolitan Washington	621,059	100.0	907,816	100.0	46.2
District of Columbia	486,869	78.4	663,091	73.0	36.2
Metropolitan outside of D. C.	134,190	21.6	244,725	27.0	82.4
District of Columbia	486,869	100.0	663,091	100.0	36.2
Negro	132,068	27.1	187,266	28.2	41.8
White*	354,801	72.9	475,825	71.8	34.1
Metropolitan outside of D. C.	134,190	100.0	244,725	100.0	82.4
Negro	20,681	15.4	26,517	10.8	28.2
White*	113,509	84.6	218,208	89.2	92.2

* Includes small number of Chinese, Indian, etc.

Recent estimates based on Census Bureau sample surveys indicate that, while the population of the metropolitan area as a whole increased by one-third between 1940 and 1947, both the spreading out of whites in the suburban areas and the concentration of Negroes in the District continued. These Census surveys revealed that in 1947 only 20% of the dwelling units in the Washington, D. C. Metropolitan Area were occupied by Negroes, although they constitute 24% of the total Metropolitan Area population.[68]

The disproportionate increasing concentration in the District of Columbia of Negroes into crowded areas, compared to whites, is further illustrated by the following statistics from the 1930 and 1940 U. S. Censuses showing that during the ten years between 1930 and 1940, the number of Negroes living in areas with a population density of sixty or more persons per acre had considerably more than doubled, while whites had increased by only 87%; and that by 1940, two-thirds of all the Negroes in the District, but less than two-fifths of the whites, were living in such crowded areas.[69]

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[68] Bureau of the Census, Current Population Reports (Population Characteristics, Series P-21, No. 1, July 23, 1947) and (Housing, Series P-71, No. 1, July 14, 1947).

[69] A vivid description of extreme overcrowding of Negroes in the District of Columbia is contained in Agnes E. Meyer, "Negro Housing—Capital Sets Record for U. S. in Unalleviated Wretchedness of Slums", *The Washington Post*, sec. II, p. 1B, Sunday, Feb. 6, 1944:

"Not only houses have been subdivided, but small rooms, already too filthy for animal habitation, have been partitioned with cardboard to absorb more tenants.

"In Burke's Court, 14 occupants have been stowed away in a single room; in Ninth St. N.W., a small house holds 19 persons, while a woman and three children lived in the basement.

"Five or six persons to a room, occupying at times a single bed, is a commonplace."

POPULATION GROWTH IN CENSUS TRACTS WITH SIXTY OR MORE PERSONS PER NET RESIDENTIAL ACRE, FOR THE DISTRICT OF COLUMBIA; 1930 to 1940 [70]

Color	Population in 1930	Population in 1940	Increase in Population 1930 to 1940
WHITE			
Number	98,667	184,684	86,017
Percent of total white	28	39	
Percent of increase			87
NEGRO			
Number	57,285	124,556	67,271
Percent of total Negro	43	67	
Percent of increase			117

The Negro veteran has been particularly affected by the substandard character and inadequate supply of housing. A recent survey by the Census Bureau indicates that the gross vacancy rate for privately financed dwelling units in the Washington, D. C. metropolitan area is 1.0% in white neighborhoods and 0.4% in Negro neighborhoods, and that "only three-fourths of the private vacancies in the area were habitable; of these only one-sixth were being offered for rent or sale . . . One-fourth of the married white World War II veterans and seven-tenths of the married Negro veterans in the Washington Area were doubling up with relatives or friends or were living in rented rooms, trailers or tourist cabins." [71]

The ever increasing density, congestion, and "piling up" of Negroes is also typical in other cities. In Columbus, Ohio, between 1940 and 1947, the non-whites increased from 9% to 11% of the total population, but the proportion of the total dwelling units available to non-whites *decreased* from 9% to 8%.[72] Over 90% of the Negroes in Chicago are in

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[70] Census tracts with 60 or more persons per net residential acre: 27-28, 30, 32-34, 36-37, 39, 42-44, 46, 48-50, 56-57, 59, 62, 66, 81-83.

[71] Bureau of the Census, "Survey of World War II Veterans and Dwelling Unit Vacancy and Occupancy in the Washington, D. C., Metropolitan District," (Population HVet—No. 84, Feb. 4, 1947).

[72] U. S. Bureau of the Census, Current Population Reports (Population Characteristics, Series P-21, 1947) and (Housing, Series P-71, 1947).

blocks predominantly occupied by Negroes.[73] By 1934 seventy-five percent of the colored population was thus concentrated in a number of other cities, with not a single nonwhite resident in the vast majority of the residential blocks of many American cities.[74] The degree of Negro urban concentration in 1940 is shown in the following table:

DISTRIBUTION OF NEGRO POPULATION IN SELECTED CITIES BY CENSUS TRACTS: 1940[a]

CITY	Total Number Census Tracts	Number Census Tracts with 20 per cent & more Negroes	NEGRO POPULATION		PERCENT OF NEGRO POPULATION	
			Total	In Census Tracts with 20 per cent and more Negroes	In Census Tracts with 50 per cent Negroes and over	In Census Tracts with 20 per cent Negroes and over
New York[b]						
Manhattan	94	15	298,365	208,331	69.4	87.0
Brooklyn	118	8	107,263	59,018	11.9	55.0
Queens	60	2	25,890	12,078	None	46.6
Chicago	935	98	277,731	259,573	83.7	93.1
Philadelphia	404	49	250,880	188,592	55.1	67.1
Detroit	369	53	149,119	129,417	66.7	85.9
Cleveland	206	29	84,504	67,316	79.6	90.7
Los Angeles	303	19	63,774	52,283	65.6	82.0
Pittsburgh	194	23	62,216	38,307	42.6	63.2
Cincinnati	107	8	55,593	43,171	72.9	77.6
Indianapolis	107	19	51,142	42,506	58.6	83.6
Newark	98	17	45,760	29,958	33.3	72.0
Columbus, O.	60	9	34,701	26,606	56.4	73.5
Boston	156	7	23,679	17,029	37.1	72.4
Dayton	53	6	20,273	17,729	81.8	87.8
Buffalo	72	2	17,694	11,961	51.1	68.1
Atlantic City	23	7	15,668	15,499	79.6	98.2
Toledo	55	3	14,597	9,960	68.1	68.1
Milwaukee	153	4	8,821	6,861	58.9	77.8

[a] Source: *Population and Housing, Statistics for Census Tracts*, 16th U. S. Census.

[b] New York City is divided into health areas rather than census tracts.

[73] St. Clair Drake and Horace Cayton, "Black Metropolis," p. 176 (1945).

[74] Homer Hoyt, "The Structure and Growth of Residential Neighborhoods in American Cities," Federal Housing Administration, pp. 65, 63 (1939).

(b) The Negroes' disproportionate share of substandard housing.

The congestion and overcrowding in Negro housing in the District of Columbia is accentuated by the sharp differences in the quality of housing available to Negroes as compared with whites. These differences are illustrated by the following 1940 U. S. Census data:[75]

PERCENT OF OCCUPIED DWELLING UNITS HAVING SPECIFIED DEFICIENCIES, BY TENURE AND COLOR OF OCCUPANTS, FOR THE DISTRICT OF COLUMBIA: 1940

DWELLING UNIT DEFICIENCY	TENURE			
	All dwelling units		Tenant-occupied dwelling units	
	White	Non-white	White	Non-white
Needed:				
Major structural repairs and/or private bath and/or private flush toilet	12.7	40.2	16.3	46.2
Major structural repairs	0.9	8.3	1.1	9.4
Lacked:				
Private flush toilet	11.1	35.5	14.7	41.2
Running water	1.5	12.3	2.0	13.8
Electric lighting	0.5	16.5	0.5	19.2
Refrigeration facilities	2.6	6.4	3.7	7.7

These significant data are vividly translated into human terms by Mrs. Agnes E. Meyer in her major article in *The Washington Post* of Feb. 6, 1944, on Negro housing in the District:[76]

"In my journey through the war centers I have visited the worst possible housing. But not in the

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[75] Derived from data in tables 6, 8 and 9 of "Housing—General Characteristics, District of Columbia," 16th U. S. Census, 1940.

[76] Agnes E. Meyer, "Negro Housing—Capital Sets Record for U. S. in Unalleviated Wretchedness of Slums," *The Washington Post*, sec. II, p. 1B, Sunday, Feb. 6, 1944. Mrs. Meyer's article is accompanied by a photograph comparing housing at Fairlington (for whites) with that of the Negroes displaced by the Pentagon Building. Photographs of Negro slums within the shadow of the Capitol building are in Joseph D. Lohman and Edwin R. Embree, "The Nation's Capital," 36 Survey Graphic

Negro slums of Detroit, not even in the Southern cities, have I seen human beings subjected to such unalleviated wretchedness as in the alleys of our own city of Washington . . . The outdoor toilets are frequently stopped up, so that several neighboring houses, as well as the passerby, use the nearest obtainable facilities.

"In one row of houses the toilet and the well, where water is pumped by hand, are 4 feet apart. . . . Many of the toilets have such defective doors that they afford no privacy. One row of houses below the street level and continually damp has such a long record of tuberculosis that it is popularly known as T. B. row. . . . But what can, for instance, our very competent Health Department do about it? The only thing it can do is put the tenants on the street because there is not, and has not been for six months, a single available Negro dwelling in Washington, except a few for immigrant war workers. . . . When the victims are expelled from one overcrowded place, they are taken in by relatives or friends whose rooms are still more congested.

". . . The crowding in the slums of the District has also been intensified by the fact that not only housing

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33, 35 (Jan. 1947) and Loren Miller, "Covenants for Exclusion," 36 Survey Graphic 541, 543 (Oct. 1947). See also the photographs of Negro urban homes in Richard Wright and Edwin Rosskam, "12 Million Black Voices," pp. 91, 94, 101, 106, 107, 108, 110, 111, 114, 115, 132 and 147 (1941). As long ago as 1932 when the situation was much less acute, the Report on Negro Housing of the President's Conference on Home Building and Home Ownership pointed out that enforced residential segregation "has kept the Negro-occupied sections of cities throughout the country fatally unwholesome places, a menace to the health, morals and general decency of cities, and 'plague spots for race exploitation, friction and riots'." (pp. 45, 46, 143-198). See also Woofter, "Negro Problems in Cities," 95 (1928); Report of Pennsylvania State Temporary Commission on the Conditions of the Urban Colored Population, 139-142 (1943); Robert C. Weaver, "Housing in a Democracy," 244 Annals of the American Academy of Political and Social Science, 95-96 (Mar. 1946); Gunnar Myrdal, "An American Dilemma, The Negro Problem and Modern Democracy," 626 (1944).

"I could see the stars and moon shine through the roof of the kitchen," said petitioner Hurd in describing one of the dwelling units he was shown for possible purchase as a home before he bought his present house (R. 310).

but the areas formerly occupied by Negroes have decreased. Various developments such as public buildings, war housing projects for whites and new roads have swept away many acres of ground heretofore open to Negro occupancy . . ."

The disproportionate degree of Negro substandard housing is not due solely to poverty, but is significantly attributable to segregation and the discriminated housing market."[77]

The results of the April, 1947, Census Bureau survey of housing characteristics in the Washington, D. C., Metropolitan Area show that Negroes still live in much worse housing than whites.

PERCENT OF OCCUPIED DWELLING UNITS HAVING SPECIFIED DEFICIENCIES, BY COLOR OF OCCUPANTS, FOR THE WASHINGTON, D. C., METROPOLITAN DISTRICT: 1940 AND 1947[78]

DWELLING UNIT DEFICIENCY	WHITE		NON-WHITE	
	1940	1947	1940	1947
Needed:				
Major structural repairs and/or private bath and/or private flush toilet	11	6	41	35
Major structural repairs	3	2	12	19
Lacked:				
Private flush toilet	10	5	32	23
Running water	3	1	13	11
Central heating	*	3	*	30
Electric lighting	1	Less than 1	2	8

* Data not shown by color.

The *Real Property Inventories* of the Federal Housing Administration demonstrate that this pattern of Negroes living in substandard dwellings in much higher proportions

[77] Corienne K. Robinson, "Relationship Between Condition of Dwellings and Rentals, by Race," 22 Journal of Land & Public Utility Economics 296 (Aug. 1946); Richard Sterner, "The Negro's Share," 187-188 (1943).

[78] Derived from data in tables 6 and 8 of "Housing—General Characteristics, District of Columbia," 16th U. S. Census, 1940; and from Table 2 of "Housing Characteristics of the Washington, D. C., Metropolitan District: 1947," Series P-71, No. 1, Bureau of the Census, July 14, 1947.

than whites is similarly pronounced in other cities throughout the nation.[79]

(c) Economic exploitation through inflated rentals and housing costs.

Restrictive covenants have been a direct and major cause of enormous inflation of rentals and housing costs for Negroes. They "lay the Negro masses open to exploitation and . . . drive down their housing standard even below what otherwise would be economically possible."[80] C. K. Robinson, Housing Analyst of the National Housing Agency, has shown that, *at every income level*, non-whites receive proportionately more substandard housing, or less housing value for the same price than do white families who have access to the open housing market,[81] and, progressively, as the Negro pays higher rentals, the greater becomes the racial differential in the quality of housing. Because the supply of homes available for purchase by Negroes is relatively much smaller than the supply available to the white population, Negroes must pay more to get housing than would white persons.[82] Real estate dealers often set two prices on a single piece of property—one for

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[79] See Richard Sterner, chap. X, Urban Housing, in "The Negro's Share" (1943).

[80] Gunnar Myrdal, "An American Dilemma, The Negro Problem and Modern Democracy," p. 625 (1944); Lester Velie, "Housing: The Chicago Racket," *Collier's*, p. 112 (Oct. 26, 1946).

[81] Corienne K. Robinson, "Relationship Between Condition of Dwellings and Rentals, by Race," 22 Journ. of Land and Public Utility Economics, 296 (Aug. 1946). See also Sara Shuman, "Differential Rents for White and Negro Families," Journal of Housing, pp. 167-174 (Aug. 1946).

[82] Gunnar Myrdal, "An American Dilemma, The Negro Problem and Modern Democracy," pp. 379, 623 (1944); T. J. Woofter, Jr. "Rent," Chap. VII in *Negro Problems in Cities*, p. 121; George W. Beebler, Jr., "Colored Occupancy Raises Values," The Review of the Society of Residential Appraisers, p. 4 (Sept. 1945).

white buyers and a higher price for Negroes.[83] The National Association of Real Estate Boards has stated: "Negroes in the same economic groups are *better* pay because the demand for housing is so much keener."[84] White real estate companies renting apartments to Negroes and whites in the same building charge the Negroes 20% to 50% more rent than the white tenants are charged.[85] This inflation of housing costs and rentals for Negroes is further corroborated by the uncontradicted testimony in the present cases that the residential property in the area would be sold for 30% more to Negroes than to whites (R. 157, 261, 263, 337, 338, 340, 344, 362, 364), and that the rent charged Negroes in the neighborhood is higher than for whites (R. 282, 286). And because the Negro is constricted to residence in blighted or slum areas, where finance institutions are hesitant to make loans on property, he must pay higher interest on the money he borrows for home purchase or repair.[86]

(d) Disease, death, crime, family disorganization, juvenile delinquency.

The overcrowding and segregation of Negroes into slum ghettoes which results so largely from restrictive covenants are direct influences in increasing disease and death among Negroes.

Tuberculosis: The much larger incidence of tuberculosis mortality among colored people than whites is shown by

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[83] John C. Alston, "Negro Housing in Columbus, Ohio," (1946, publ. by Columbus Urban League) p. 12, 13; Alonzo G. Moron, "Where Shall They Live," The American City, p. 69 (April, 1942).

[84] "Realtor Work for Negro Housing," p. 5 (Oct. 24, 1944).

[85] St. Clair Drake and Horace R. Cayton, "Black Metropolis, A Study of Negro Life in a Northern City" 185, 186 (1945).

[86] Corienne K. Robinson, "Relationship Between Condition of Dwellings and Rentals, by Race," 22 Journ. of Land and Public Utility Economics, 296 (Aug. 1946).

the following data compiled by the District of Columbia Tuberculosis Association:

TUBERCULOSIS (ALL FORMS) DEATHS, DISTRICT OF COLUMBIA

1930 to 1945*

Rates Per 100,000 Population

	White	Colored	Total
1930	62.0	285.0	117.1
1931	60.1	277.0	119.8
1932	61.1	280.1	121.6
1933	57.3	289.2	124.0
1934	47.4	272.0	108.8
1935	43.3	259.3	102.2
1936	47.8	264.5	107.0
1937	45.0	227.8	94.9
1938	38.8	240.1	93.8
1939	37.5	231.9	90.6
1940	42.2	207.1	89.1
1941	34.7	182.5	76.9
1942	31.8	175.4	72.8
1943	30.0	158.7	66.4
1944	33.6	148.1	66.2
1945	29.8	142.0	61.9

* (Compiled from statistics of D. C. Bureau of Vital Statistics and Health Department.)

The District of Columbia Tuberculosis Association has further pointed out that in the District for 1945, tuberculosis, although the fifth ranking cause of death for the total population, was the second ranking cause of death for Negroes; and that although Negroes constitute only about 29% of the District's population, almost half of all new cases of tuberculosis reported in the District during the 6 years from 1940 through 1945 have been of Negroes.[87] The high correlation between Negro residence and tuberculosis mortality in the District of Columbia is strikingly illustrated by a comparison of Chart 1 (Negro population, 1940, in Dist. of Col.) with Chart 3 (tuberculosis death rate, 1940, in Dist. of Col.), in the Appendix to this brief. That it is not Negro biological susceptibility so much as the

[87] "Facts and Figures on Tuberculosis in D. C.," (Mimeographed study prepared by District of Columbia Tuberculosis Association) pp. 15-16, 17, 18-19, and Appended Tables 1, 1a, 2, 3, 6.

poor quality of housing and excessive congestion that is associated with tuberculosis mortality is indicated by the facts that tracts 42, 43 and 78 (50% Negro or over) had a tuberculosis rate of 50-99 deaths per 100,000, whereas tracts 4 and 58 (under 10% Negro) had a tuberculosis rate of 200 or more deaths per 100,000.

Equally illustrative is the correlation of the concentration of the Negro population and tuberculosis mortality in Chicago, as shown by Charts 9 and 10 in the Appendix to this Brief. See also Chart 11 showing pneumonia rates in Chicago.

Infant Mortality: In the Appendix to this brief, charts 1 and 4 show the high correlation in the distribution in the District of Columbia of the Negro population and of infant mortality rates.

Crime, Immorality, Juvenile Delinquency: Overcrowding of people in slum areas is a major cause of increased crime, family disorganization, immorality, juvenile delinquency, and abnormal patterns of living. The President's Conference on Home Building and Home Ownership has emphasized: "Patient investigations have revealed that the increase in juvenile delinquency has been largely a matter of the segregation of Negroes into areas of deterioration."[88]

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[88] *Negro Housing*, The President's Conference on Home Building and Home Ownership, Washington, D. C., p. 145 (1932). The President's Conference further stated: "At least three types of social pathology have been observed to have a high and inescapable correlation with the character of Negro residence areas. These are: (1) A high rate of delinquency, (2) A high rate of mortality, and (3) A distorted standard of living . . . The bulk of Negroes still live where health standards are hardest to maintain, where juvenile delinquency shows highest ratio, where vice goes unchecked, and where rents are far in excess of value and ability of occupants to meet them" (pp. 52, 71). Clifford R. Shaw and Henry D. McKay, "Juvenile Delinquency and Urban Areas," pp. 156-157 (1942): ". . . the significantly higher rates of delinquents found among the children of Negroes, the foreign born, and more recent immigrants are closely related to existing differences in their respective patterns of geographical distribu-

The high juvenile delinquency rate in the segregated areas in the District of Columbia are shown in Charts 5 and 6, in the Appendix of this brief, showing for 1937 the distribution of the arrests of persons under 17 years and the distribution of the residences of delinquent children committed to institutions or placed on probation.

Charts 1 and 7 in the Appendix show the concentration of the Negro population and of children from 3 to 18 years of age in the District of Columbia; and Charts 9 and 12 show the concentration of Negroes and of juvenile delinquency in Chicago.

Other forms of social pathology arise from slum living. "A chief source of revenue for both renters and home buyers is lodgers. The extent to which morals and health are jeopardized by the promiscuous taking in of roomers has been well established by many studies. This is one of the principal evils in Negro housing." [89] The restriction of Negroes into slum living "has promoted street prowling, excessive night life, the prevalence of tuberculosis and other disease, and a high crime rate." [90] The frustrations to which these restrictions contribute are manifested in the high insanity rates shown in Chart 8 (mental patients admitted to St. Elizabeth's Hospital in the District of Columbia, 1937) and in Chart 13 (average insanity rate in Chicago), and their correlation with the densely crowded Negro areas (Charts 1 and 9). See Appendix to this Brief. The close relationship between slum housing and these social pathologies is vividly illustrated by the following

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tion within the city. If these groups were found in the same proportion in all local areas, existing differences in the relative number of boys brought into court from the various groups might be expected to be greatly reduced or disappear entirely."

[89] *Negro Housing*, The President's Conference, *supra*, p. 72.

[90] Harry Elmer Barnes, Society in Transition, 347-348 (1939); see also Guy B. Johnson, "The Negro and Crime," 217 Annals of the American Academy of Political and Social Science, 94-95 (Sept. 1941).

section from the report of the Chicago Crime Commission survey made in 1945 in the Fifth Police District in Chicago,[91] which practically coincides with Chicago's Negro "Black Belt"[92]:

"*Housing*

"One of the principal factors leading to a high crime rate in the Fifth Police District is the inadequate housing situation that prevails there. From the observation of Chicago Crime Commission investigators and through interviews with numerous representative citizens the conclusion is inescapable that undesirable living conditions in this area contribute materially to a high incidence of criminality.

"Every available facility for housing is utilized to provide sleeping and living quarters for the huge population that is crowded into the small geographical area comprising the Fifth Police District. It is estimated that there are approximately three thousand kitchenette apartment buildings in the district. The kitchenette apartments are extremely small. Usually a three burner gas stove for cooking purposes is provided in a small enclosure within each apartment. In some instances, old family residences have been converted into apartments for numerous families. One old family home now houses forty-six families. A three flat building is now occupied by sixteen families. Another building, originally constructed as a lodging place for unmarried persons, is being used as a dwelling place for almost two hundred families.

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"Such conditions naturally precipitate lawless acts. Some police officials of the district stated that inadequate housing facilities is a major cause of a large amount of the

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[91] Virgil W. Peterson, "Crime Conditions in Fifth Police District," in *Criminal Justice*, No. 73, pp. 15-16 (May, 1946), (Journal of the Chicago Crime Commission, 79 West Monroe Street, Chicago).

[92] Maps of the Fifth Police District on pp. 16 and 17, of Peterson's report, *supra*, show the crime centers in Chicago for 1944 and 1945; see the maps of the Negro area and population density in Joseph D. Lohman, "The Police and Minority Groups," pp. 18, 20, 24 (1947), and chart 9 in the Appendix to this brief.

crime in this area. Crowded conditions result in family arguments. In many instances community bathroom and cooking facilities are used by several families. Disputes arising over the use of such facilities, many times end in acts of violence. Meals are prepared by several families on a common range. Cuttings and shootings have followed arguments over the time required to cook a piece of meat. It is very common for entire floors in residence buildings to be equipped with only one bathroom which accommodates several families. Numerous men and women are thus thrown into close contact with one another resulting in quarrels and immorality. In many living facilities but one unsanitary washroom is available to the members of several families. Crowded sleeping quarters make it necessary in many instances for as many as four people to sleep in one bed. This naturally increases immorality. One resident reported that numerous people sleep in hallways on newspapers, thus creating a fire hazard.

"The living conditions also contribute to the juvenile delinquency problem. A member of the Housing Commission reported that it is very common for the parents to live at one address and the children at another. Some families are completely separated with the children living at one place, the father at a different location and the mother at a third address. It is obvious that such conditions prevent adequate parental supervision and undoubtedly contribute materially to juvenile delinquency.

"Due to the extremely congested conditions found in the Fifth Police District, the people living there have no chance for the development of normal home lives. In fact, with many residents their attachment to the home is naturally very slight. During the war numerous Negroes living in the Fifth District worked in war plants located many miles away. As was customary, workers obtained transportation through a car pool arrangement. With no incentive to return home following the working hours many men and women would stop in taverns and other places of amusement. Frequently this resulted in immorality and other delinquent acts. The deplorable unsanitary conditions existing in many housing facilities tend to create a feeling of unrest and discouragement on the part of many residents

People living under more desirable conditions are naturally viewed with envy. And when it is considered that little opportunity is afforded for moving away from the living conditions and surroundings that prevail in the area it is not difficult to understand that many people do not have a very hopeful outlook on the future.

"Almost without exception, of the numerous citizens of the district interviewed by Crime Commission representatives, the housing situation was mentioned as one of the most important factors contributing to the high crime and delinquency rate in the area."

(e) Race riots and tensions

Racial restrictive covenants are one of the contributing causes of race riots and racial tensions. The process of promoting these covenants brings to whites a program predicated upon fear of Negroes, and creates in Negroes deep resentments and hatreds against whites. The covenants sharpen the lines of demarcation between Negro and white communities, preventing the growth of mutual understanding between neighbors, and providing the physical basis for the quick growth of both white and Negro mobs. They both depress and compress Negro housing in a growing population to the point where the irresistible force of population pressure meets the immovable barrier of the covenant boundary line.

In their study of the 1943 Detroit race riots, Lee and Humphrey pointed out the relationship of bad housing, restrictive covenants and race riots:[93]

"Take an already overcrowded situation, add half again as many people, give them a great purchasing power, and still attempt to confine them within approxi-

[93] Alfred McClung Lee and Norman D. Humphrey, "Race Riot" pp. 93, 130; see also, pp. 17, 92-95, 97, 116, 140 (1943).

> mate [illegible] the old area, and the pressures developed within that increasingly inadequate 'container' will burst the walls."

. . . . . .

> "People who had become neighbors in mixed Negro and white neighborhoods did not riot against each other."

The Chicago Commission on Race Relations appointed by Governor Lowden of Illinois to study the 1919 Chicago race riots declared:[94]

> "We are convinced by our inquiry . . . that measures involving or approaching . . . segregation are illegal, impracticable and would not solve, but would accentuate, the race problem and postpone its just and orderly solution by the process of adjustment."

A manual for the use of police in the Chicago Park District states:[95]

> "The incredible congestion on the Negro South Side is a direct result of segregation buttressed by restrictive covenants. . . ."

. . . . . .

> "It is at the boundaries of the Negro community that the pressure of Negroes to expand runs up against the stone wall of white opposition. These are the regions of greatest aggravation and tension. Thus the sections adjacent to State Street and Cottage Grove and the area to the south of 63rd Street are ones in which race incidents are to be expected."

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[94] St. Clair Drake and Horace Cayton, "Black Metropolis," p. 70 (1945); see Dorsha B. Hayes, "Chicago" pp. 259-260 (1944).

[95] Joseph D. Lohman, "The Police and Minority Groups," Manual, Chicago Park District Police Training School, pp. 25, 21 (1947).

The Federal Council of the Churches of Christ in America stated, in its 1946 Biennial Report (p. 121):

> "Segregation increases and accentuates racial tensions. It is worth noting that race riots in this country have seldom occurred in neighborhoods with a racially mixed population. Our worst riots have broken out along the borders of tightly segregated areas."

Racial restrictive covenants do not spring up spontaneously. They are fostered and promoted by neighborhood associations dominated by a few persons dedicated to the spread and perpetuation of racial prejudice.[96] These promoters play up race hatreds, condition Americans to accept racism as a way of life, and supply fertile ground for Fascist, Communist and other totalitarian groups who seek to exploit the weakness in the American social and political structure. Racial covenants "give legal sanction . . . and the appearance of respectability to residential segregation. This is a significant psychological force since race restrictive housing covenants are usually most prevalent among the middle- and upper-income groups in the community. As a result, other groups resort to less formal but equally effective means of keeping minorities out."[97] The sanction lent to covenants by court enforcement engenders

[96] In the District of Columbia there was recently established a "Greater Woodridge Land Covenants Alliance" to "expedite and make secure complete coverage of Woodridge [a section of Northeast Washington] with restrictive covenants." "Neighborhood News" (Official publication of the Rhode Island Citizens Association, January 1947). Several of these neighborhood associations are vigorously promoting the extension of restrictive covenants to land not now covered and seeking court enforcement of existing covenants. "Neighborhood News," *supra* (January 1947); "District of Columbia Citizen," D. C. Federation of Citizens Associations (July 3, 1947). Restrictive covenants are now even being utilized to take away the jobs of janitors and custodians living in the basements of white apartment buildings. See *The Washington Post*, pp. 1, 4M (Sunday, Nov. 9, 1947).

[97] Robert C. Weaver, "Hemmed In" p. 3 (Amer. Council on Race Relations, 1945).

the belief that covenants create a legally enforcible right, a right which may be furthered by violence.[98]

(f) Effects on municipal facilities, public institutions, and on the entire community.

Because racial restrictive covenants force Negroes to reside in the oldest, most deteriorated, most densely populated and generally neglected areas of our cities, the overused public and semi-public facilities available to Negroes are usually of inferior quality. Police, fire-protection, garbage removal, street cleaning, recreational, and other municipal services are inadequate, and vice is permitted to flourish.[99] Residential segregation leads to segregated schools, churches, YMCA's and other facilities even in cities where such separation has no legal basis.[100] It relegates Negroes to second class status in most community activities or eliminates them entirely; and it frustrates the development of their potential productive and creative ability.

Similarly pervasive are the effects of restrictive covenants on the entire community. Crime, disease, immorality

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[98] Illustrative is the language of one McNerney speaking before the Dahlgren Terrace Citizens Association of Washington, D. C., on Sept. 17, 1947: "It's too bad you can't take a nice healthy club or a crow-bar and lay them in the gutter where they belong. But our only redress is in the courts. . . . The only way you can protect yourself is by covenant. . . . They have been upheld by the United States Supreme Court. . . . You're not being asked to use violence like we once had to use on R street." *The Washington Post* (Sept. 18, 1947). As long ago as 1932, the President's Conference on Home Building and Home Ownership pointed out: "The racial factors in the problem of housing are very largely those prompted by whites in an attempt to limit the areas in which Negroes may live. Attempts to crystallize this attitude in public opinion in some instances lead to racial conflict." *Negro Housing*, President's Conference on Home Building and Home Ownership, etc. p. 146 (1932).

[99] Thomas J. Woofter, Jr., "Negro Problems in Cities" Ch. XV (1928); Walter C. Reckless, "Vice in Chicago," pp. 190-196 (1933).

[100] Robert C. Weaver, "Community Action Against Segregation," Social Action, pp. 14-17 (Jan. 15, 1947); Weaver, "Northern Ways," 36 Survey Graphic, pp. 43-44 (January 1947).

and racial tensions cannot be confined in an urban community, and potentially affect all persons in the community. Furthermore, slums and their effects cost money. They increase the costs of disease, police and fire protection, courts, jails, relief burdens, etc. They absorb a high proportion of the total costs of municipal services, while yielding only a small proportion of the total real estate taxes. The Federal Works Agency has reported that in 1940 the slums and blighted areas in the larger cities of the Nation provided only 6% of the municipal revenue from real estate, but absorbed 45% of the service costs which the municipalities rendered.[101] Today in the larger industrial centers an ever increasing number of colored families, who are now restricted to the slums, could pay their way in housing and taxes. This loss in city revenue must be subsidized by the rest of the community.

Restrictive covenants also prevent proper urban redevelopment. Many slum areas are located in otherwise desirable sections near the center of the city. But artificially inflated incomes can be extracted from the slum tenants who are excluded by restrictive covenants from housing elsewhere and cannot escape. Therefore selfish forces seeking

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[101] Federal Works Agency, "Postwar Urban Development" (1944). Illustrative is Navin's analysis of a blighted area of six census tracts in Cleveland showing that "the total cost of maintaining and operating this section for one year represented nearly 25/1000 of the appraised value of the land and buildings upon which the taxes are levied, and the potential yearly income does not exceed 26/1000 of the same sum"; that the area, housing only 2.5 per cent of the city's population, accounted for 14.5 per cent of the total fire protection cost, 6.5 per cent of the police protection cost, and 7.3 per cent of the cost of health services; and that while the per capita fire protection cost for the city as a whole was $3.12, in this section it was $18.27. Robert Bernard Navin, "Analysis of a Slum Area," pp. 61, 67, 69 (1934). See also Edith Elmer Wood, "Slums and Blighted Areas in the United States" (1935); Federal Emergency Administration of Public Works, "Urban Housing" (1937); Mabel L. Walker, "Urban Blight and Slums" (1938); Jay Rumney and Sara Shuman, "The Cost of Slums in Newark," Housing Authority of the City of Newark, p. 15 (1946).

to retain these profitable but obsolete and unhealthy slum housing investments, supported by organizations whose interest in segregation has been stimulated by restrictive covenants, resist and impede redevelopment and slum clearance.[102]

Even more important are the intangible losses. Restrictive covenants foster fear of Negroes and generate hate against the covenant sponsors; they encourage delinquency, political corruption, and crime; by sanctioning racism they bankrupt the moral and democratic values of a country founded on the principle that "all men are created equal"; and they directly repudiate the philosophy of free competition in our economy.

(3) NEGRO RESIDENTIAL OCCUPANCY OR PROXIMITY DOES NOT "DEPRECIATE PROPERTY VALUES." USE OF PROPER OCCUPANCY STANDARDS, RATHER THAN RACIAL RESTRICTIVE COVENANTS, IS THE WAY TO PROTECT NEIGHBORHOOD PROPERTY VALUES.

Exponents of racial restrictive covenants often attempt to justify them on the theory that the influx of Negro residents into a community "depreciates property values." That assertion is untrue, for at least three reasons:

(1) In many instances, as the testimony in this case shows (R. 264, 337, 338, 350, 352), the depreciation of the neighborhood has taken place before the Negro begins to buy into it. T. J. Woofter, Jr., has described the process as follows:[103]

> "It was observed during the Chicago study and during this study, however, that the areas that are usually

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[102] Lester Velie, "Housing: Detroit's Time Bomb," *Colliers*, p. 5 (Nov. 23, 1946); Robert C. Weaver, "Planning for More Flexible Land Use," 23 Journal of Land & Public Utility Economics, p. 32 (Feb. 1947).

[103] T. J. Woofter, Jr., "Negro Problems in Cities," p. 74 (1928). A joint survey of Negro residential occupancy in Philadelphia in 1939 by the Philadelphia Chapter of the Society of Residential Appraisers and the

penetrated by Negroes in their expansion are in neighborhoods that are already depreciating in value. There are numerous signs of such depreciation which often escape the observation of neighborhood residents who are not keen observers. Single family residences begin to give way to boarding-houses and apartments. Flats are built, and sometimes business or manufacturing establishments come into the neighborhood. Thus an exclusive residence section is cheapened. If one of these depreciating sections lies close to a Negro neighborhood, or if it has good transit service to places where Negroes work, the time finally comes when Negroes are willing to pay more for property there than the white occupants are, and the transition begins."

This cycle in the change of a residential neighborhood was discussed by Professor E. Franklin Frazier, head of the Department of Sociology of Howard University, in his testimony in this case (R. 350-353).

(f) The fact is that Negroes, because of their greater need for housing, are willing to pay more than whites for comparable housing.

The influx of Negroes frequently tends to raise the market value of the houses. Examples of areas where Negro occupancy has *increased* the values of the area are the Brookland subdivision in the District of Columbia, largely occupied by Negroes employed in the Government;[104] an area in Philadelphia recently analyzed by the Society of Residential Appraisers where the average sales

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Wharton School of Finance revealed that "By the time colored occupancy spreads to any neighborhood it is at least 30 years old and has the characteristics of physical and functional obsolescence that removes it from the category of a good neighborhood." Oscar I. Stern, "Long Range Effect of Colored Occupancy," The Review of the Society of Residential Appraisers, p. 5 (January, 1946). See also National Urban League, "Racial Problems in Housing," Bull. No. 2, p. 13 (Fall 1944).

[104] Robert C. Weaver, "Race Restrictive Housing Covenants," 20 Journ. of Land & Public Utility Economics 183, 191 (Aug. 1944).

price before colored occupancy was $2800-$3200, and about six months after the first colored purchase the average value for the same property was $4,500-$5,000;[105] and the Washington Park Area in Chicago where the front foot land values have maintained a higher level than similar nearby white areas.[106] Of course, as Gunnar Myrdal, T. J. Woofter, Jr., and others have shown,[107] if white property owners in a neighborhood become panicked by prejudice and rush to sell their property all at once, they would probably obtain a lower price on such hurried sales. But if the owners remain calm and hold on to their property, its sale value may even appreciate or at the very least will remain at the level justified by the age, lack of improvement of the buildings, and the general trend in land

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[105] George W. Beebler, Jr., "Colored Occupancy Raises Values," The Review of the Society of Residential Appraisers, p. 4 (Sept., 1945).

[106] The Washington Park Area in Chicago, which passed from white to Negro occupancy in the late 1930's (see St. Clair Drake and Horace Cayton, "Black Metropolis," pp. 184-190 (1945)), is similar to the Hyde Park Area which was and is white occupied. The history of front foot land values in these two areas, as shown in the authoritative Olcott's Land Value Blue Book for Chicago, is as follows:

	Hyde Park Area (Drexel Blvd. and Ingleside Avenues between 64th and 67th Streets)	*Washington Park Area* (Champlain, Langley and Evans Avenues between 61st and 63rd Streets)
1928	$150-200	$150
1937	$65-80	$50-55
1946	$40-45	$45-50

Thus, in 1946 land values in the Negro occupied Washington Park area were higher than in the all-white Hyde Park area. From 1928, there had been 66% decline in Washington Park and 75% decline in Hyde Park. The explanation is largely the Negro's pressing demand for shelter, artificially stimulated by residential segregation.

[107] Gunnar Myrdal, "An American Dilemma, The Negro Problem and Modern Democracy," p. 623 (1944); T. J. Woofter, Jr., "Negro Problems in Cities," p. 74 (1928); Harold I. Kahen, "Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem," 12 U. of Chi. L. Rev. 198, 202 (Feb. 1945); Lester Velie, "Housing: Detroit's Time Bomb," *Colliers*, p. 16 (Nov. 23, 1946).

values. Whatever drop in value may initially occur is, in truth, caused by white panic to sell, not by Negro occupancy. The promotion of racial restrictive covenants to buttress residential segregation, because it invariably creates or stimulates fear of Negro occupancy, is a direct cause of such panic sales.

(3) Negroes can, and where given the opportunity do, maintain high occupancy standards. This has been shown by surveys of the National Association of Real Estate Boards, by experience in public housing, and by other students of housing. The October 24, 1944, pamphlet entitled "Realtor Work for Negro Housing," by the National Association of Real Estate Boards, contains the following questions and answers given in a survey of Negro housing which the Association made (see R. 275,276): [108]

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[108] See St. Clair Drake and Horace Cayton, "Black Metropolis," pp. 207-208 (1945). Representative comments by individual realtors on their experiences with Negro housing, as set forth in the October 24, 1944 pamphlet of the National Association of Real Estate Boards, are:

Page 5: ". . . colored families if investigated in the same way as white families, will be found good mortgage risks. They have been, in all cases in our experience, honest and regular in their monthly payments. This may be *in part because of the fact that they have so much at stake.* In my opinion insurance companies, banks, building and loan associations, etc. might well undertake the building and financing of homes for negroes in large numbers."

. . . . .

"Negroes have their economic groups just the same as white people. Negroes in the same economic groups as whites are *better* pay because the demand for housing is so much keener. The most foolish practice for a Realtor is to class *all* Negroes in the same poverty-stricken, ignorant group. It would be just as ridiculous, and as destructive to the field of new housing, to class all white people as hillbillys or slum dwellers."

. . . . .

Page 6: "So-called 'Negro abuse of property' is a result of giving poor or modest Negro families tremendously old gingerbread homes or apartments and expecting them to make successful modern homes out of them. We can't do it. How can we expect them to? Moreover,

p. 1

"1. *Does the Negro make a good home buyer and carry through his purchase to completion?*

"'Yes' was the almost unanimous reply. Only one city, a small Southern residential city, said 'No'.

"'Very good,' 'Better than whites of the same economic status,' some cities report. 'Their tenacity and willingness to sacrifice to hold on to their homes far exceed the whites.' "

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"2. *Does he take care of his property if it is in good repair when he obtained it?*

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when 18 families are jammed into a building where 6 lived before—or when 500 families live in a neighborhood where 100 lived before—there is bound to be *overuse* and consequent discouragement about maintenance of property."

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"I believe it would be wise to recommend to the priorities board at Washington that in granting a builder priorities in cities where Negro housing is needed he must agree to construct at least 10% for the use of colored people. Perhaps 20 or 25% would be much closer to what we really should demand until we caught up with furnishing homes for the colored race."

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"Our office is engaged in constructing 80 new homes for Negroes, 5-6 rooms, half brick frame and asbestos shingle on lots 40 by 105, about a mile and a half from the Fort Rouge plant where over 18,000 Negroes are employed. The Waterfall Construction Co. built 50 5-room frame and asbestos houses in the fall of '43, all sold to and occupied by Negroes. Homes are kept up so that one could not tell any difference from those occupied by members of the white race. We have in the neighborhood of 50 land contracts or mortgages on houses owned and occupied by Negroes. Our experience has been very satisfactory. These people pay just as promptly as any real estate owners we have ever had on our books. In many cases we have examined the property and have found it in very satisfactory condition.

"We believe that where Negroes are steadily employed at regular wages you will have no more trouble collecting from them than you will from anyone else."

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Page 7: "Builders of Detroit will build 1,000 or 5,000 houses or apartments for Negroes if you find the site for us."

"'Yes', said 13 cities, including all the very large cities, and including all but one of the Southern cities. Five cities said 'No'.

"Several of the replies underscored the phrase 'if the property is in good condition when he obtained it.' One pointed out that relatively few properties sold to Negroes are in good condition.

P. 2

"Some comments: 'As good as whites of the same economic level.' 'New Negro-owned houses are comparable in neatness to any similar homes among whites.'"

. . . . . .

"3. *Is the Negro good pay as a tenant, or are more frequent collections necessary and losses greater?*"

". . . 6 cities (40%) said that the Negro was good pay, 'Good if not better than whites of the same economic status,' or 'No different from other groups for the better properties.' In 2 other cities (13%) some members had had favorable experience, other experiences were not so favorable."

. . . . . .

"4. *Does the Negro abuse property, or does he take as good care of it as other tenants of a comparable status?*

"He takes good care of it, in many cases better care than other tenants of his economic group, say 11 cities (73% of those reporting). Where Negroes have secured homes in good condition their maintenance is as good as their economic circumstances permit, the general testimony indicates, but the number of occupants is larger on the whole for Negro families and there is more doubling of families. This over-crowding where properties are already run down produces a condition that is bound to discourage good maintenance."

. . . . . .

"5. *Do you know of any reason why the great insurance companies of the country should not freely purchase mortgages upon homes and rented buildings to be occupied by Negroes, if such accommodations are properly located and managed?*

"'There is no reason why they should not,' said ¾ of the cities, including all the metropolitan cities. 'There is every reason why they should,' a large city on the North-South border adds."

. . . . . .

p. 3

"6. *Do you think there is good opportunity for Realtors in the Negro housing field in your city?*

"'Yes' say almost ⅔ of the cities (63%). 'Splendid opportunity,' 'A wonderful opportunity,' say Boards in some of the largest cities. 'Yes, in neighborhoods that will care for shopping needs, give amusement centers, and the like,' says another. 'Yes, if building code revisions can be obtained. That is the only thing standing in the way of financing new building and rehabilitation,' says another.[109]

Equally illustrative are the following experiences in public housing projects, inhabited by Negroes:

Chicago—*Ida B.-Wells Home:*[110] Inhabited by 1662 families who had been selected for occupancy therein only if they met the following conditions: (a) annual family income not exceeding $1104; (b) living in substandard homes; (c) at least 1 child under 16 (except for aged couples);

[109] This reference to the necessity of "building code revision" as "the only thing standing in the way of financing new building" presumably was intended to include restrictive covenants, since municipal building codes could not legally make any distinction between white and Negro occupancy. *Buchanan* v. *Warley*, 245 U. S. 60.

[110] Dorothy Pederson, "Public Housing Management," The Journal of Property Management pp. 405-415 (Sept. 1942), published by The Institute of Real Estate Management of the National Association of Real Estate Boards.

(d) citizens of the United States; (e) Chicago residents for 1 year; preference being given to families with lowest incomes and youngest children. These families assumed the responsibility for their own lawns and premises and even conducted a flower contest; they developed organized community activities such as juvenile clubs, Boy Scouts, Camp Fire Girls, weekly newspaper, cooperative store, etc. Although the median family income was less than $775 annually, the rental loss for an entire year (1941) totaled $156.49, only 1/19 of 1%; and even this miniscule rental deficit was liquidated by voluntary contributions from the residents of the community at a special gathering.[111]

Atlantic City, N. J.—277 unit *Stanley Homes Village:*[112] $78.31 lost in rental collections during the first 5 years of operation. "The Village was erected on a site that once was declared to be the worst breeding place of crime and disease in the resort. The average yearly income of tenant families is $800."

New Orleans, La.—896 unit *Lafitte Project:*[113] rental collection loss for October 1941 to September 30, 1942, was $5.97, or .000043394%

St. Petersburg, Fla.—*Jordan Park:*[114] "The collection loss for the period January 1st to December 31st, 1941 was .52 of 1%, and for the period January 1st to August 31st, 1942 was .40 of 1%."

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[111] Howard Vincent O'Brien, column in Chicago Daily News for January 12, 1943, reproduced in *Housing Management Bulletin*, Vol. 6, No. 1, p. 4 (Jan. 20, 1943) (publ. by Management Division, National Association of Housing Officials).

[112] Editorial in Philadelphia Evening Bulletin, reproduced in *Housing Management Bulletin*, Vol. 6, No. 1, p. 4, *supra* (Jan. 20, 1943).

[113] *Housing Management Bulletin*, Vol. 6, No. 1, p. 4, *supra* (Jan. 20, 1943).

[114] Fourth Annual Report, Housing Authority of City of St. Petersburg, "Management," quoted in *Housing Management Bulletin*, Vol. 6, No. 1, p. 4 *supra*, (Jan. 20, 1943).

A comprehensive study by the National Housing Agency indicates that Negro and white tenants in public housing, where they are of the same general economic classes, have comparable security, are selected according to the same rules, and have the opportunity to live in decent homes of similar quality, treat their property about alike, regardless of whether the housing is all white, all Negro, or for mixed racial occupancy.[115]

In her major article in *The Washington Post* of February 6, 1944, on Negro housing in the District of Columbia, Mrs. Agnes E. Meyer, after describing the wretched housing accommodations of much of the Negro population of the District of Columbia, shows how former Negro slum dwellers have responded to improved housing facilities provided by the National Capital Housing Authority:[116]

> "In the early projects constructed by the Alley Dwelling Authority, now called the National Capital Housing Authority several projects were necessarily for Negroes, as they are the majority of slum dwellers.
>
> "As some of these apartments have been in use for four years, the progress of the families is not of long duration, but already marked. In Hopkins pl., where the new development of NCHA doubled the population, there used to be three or four arrests per week. There was only one in the last year.
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> . . . . . .
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> "Better health, especially among children, is noticeable, in the NCHA housing.
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> . . . . . .

[115] Corienne K. Robinson, Housing Analyst, National Housing Agency "Racial Factors in Rent Payments, Property Maintenance, and Property Values as Reflected in Public Housing Experience," (1943) (Copy on file in library of Public Housing Administration).

[116] Agnes E. Meyer, "Negro Housing—Capital Sets Record for U. S. in Unalleviated Wretchedness of Slums," p. 1-B, section II, Sunday, February 6, 1944, *The Washington Post.*

> "In one case the National Capital Housing Authority took the total population of a slum area, 116 families. They were grouped together, in two different projects. Not only was there no friction with neighbors, but now one type of family cannot be told from the other, so quickly did the slum-dwellers conform to the better manners and demeanor of the more fortunate group."

In recent years, realtors and housing officials have "discovered" that Negroes with stable incomes are good risks for home ownership and occupancy (R. 276). The January 1946 issue of *Architectural Forum* ("Good Neighbors") sums this up as follows:

> "FHA itself has said: 'On the basis of credit analysis we consider Negro mortgagors as good or better risk than white mortgagors.' Negro spokesmen have pointed out that restrictions on type of occupancy, requiring building owners not to sell or lease except to single families, would be a far more effective check on property deterioration [than racial restrictive covenants]. The National Association of Real Estate Boards has collected opinions of its members, all giving Negro owners and renters a good risk-rating."

The facts as thus attested by public and private housing authorities, as well as by the National Association of Real Estate Boards, demonstrate that Negro occupancy does not, of itself, "depreciate property values." It is not race which causes deterioration of Negro neighborhoods into slums. Rather, the major cause is residential segregation which results in neighborhood congestion and overcrowding of Negroes into inadequate dwellings, their inability to get better housing, and owners' abandonment of good maintenance as unnecessary to attract renters or buyers in this acute Negro housing shortage.

Furthermore, the proscription of *all* Negroes by racial restrictive covenants in an attempt to "protect property

values" is entirely inappropriate. There has been no testimony whatever in these cases, other than general assertions without any supporting facts, that the plaintiffs (respondents herein) would suffer any pecuniary damage from Negro or Indian occupancy (R. 202, 206, 301, 302). Indeed, the principal plaintiff (Hodge) testified that he would not sell his "depreciated" property even at triple the price he paid for it (R. 303-304, 68); and the testimony showed, and the plaintiffs admitted, that the grantee petitioners have kept up and renovated their homes very well (R. 190, 202, 205-206, 243, 268, 283, 286-287, 312).

The covenants here are not narrowly drawn to exclude only those buyers who might reasonably be expected to affect adversely the value of property. Rather, the restrictive covenants are based solely on race. As this Court so pithily state in *Buchanan* v. *Warley*, 245 U. S. 60, 82:

> "It is said that such acquisitions by colored persons depreciate property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results."

The attempt to secure enforcement of the covenants, therefore, is based solely on prejudice, is directed solely to racial discrimination, and is in no way justified by any "depreciation of property values" assumption. This is clearly shown from the following excerpt from the testimony of Mrs. Lena A. Murray Hodge, the chief protagonist of the restrictive covenants in these cases:

(R. 38)

> "Q. And you would prefer that untidy person to a Negro, no matter how educated or cultured?
>
> "A. As long as they are white, I would prefer them.
>
> "Q. No Negro, no matter how, or whether he might

be Senator or Congressman, it would not make any difference to you?

"A. It wouldn't make any difference.

"Q. Even if the white man just came from jail you would prefer him?

"A. Because he is white and I am white."

. . . . . .

(R. 180-181)

"Q. Mrs. Hodge, since you don't know what this lady is (indicating lady in rear of court room) at the moment, if she bought you would have no objection whatsoever?

"A. Not until I found out definitely what she was.

"Q. Then, although she had not——

"A. What?

"Q. —although she had not changed a bit in her conduct or anything, if later you heard she was a Negro, you would object?

"A. I certainly would.

"Q. Although she would be the same one and you would not object, and on appearance you can't tell whether she is white or colored?

"A. I would not object until I found out.

"Q. It is the label of "Negro"?

"A. Not entirely, it is the color—yes, the label.

"Q. It can't be the color, because you can't tell whether that lady is white or colored.

"A. Yes.

"Q. So it is the label?

"A. Yes.

"Mr. Urciolo: Mrs. Hodge, in other words, if I am labeled Negro and I want to move into one of those houses you would ask that I be put out?

"The Witness: I would."

Racial restrictive covenants do not protect against deterioration in occupancy standards in the areas covered by the covenants; and by contributing to overcrowding and segregation, they lead to the undoing of property standards in other areas. "If, instead of restrictions on account of race, creed, and color, there were agreements binding property owners not to sell or lease except to single families, barring excessive roomers, and otherwise dealing with the type of occupancy, properties would be better protected during both white and Negro occupancy. This would both protect the integrity of the neighborhood and afford an opportunity for the member of a minority group who has the means and the urge to live in a desirable neighborhood. It would also prevent, or at least lessen, the exodus of *all* whites upon the entrance of a *few* Negroes—and *this is what depresses property values.*" [117]

(4) BROAD IMPLICATIONS OF THESE CASES: INTERNATIONAL, NATIONAL, MORAL

(a) International Importance

In his Foreword to Gunnar Myrdal's comprehensive study of the American Negro, Mr. Frederick P. Keppel, President of the Carnegie Corporation of New York has stated, "It is a day . . . when the eyes of men of all races

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[117] Robert C. Weaver, "Hemmed In" (Amer. Council on Race Relations, 1945); Weaver, "Housing in a Democracy," 244 Annals of the American Academy of Political and Social Science 95, 99 (March, 1946); Weaver, "Community Action Against Segregation," 13 Social Action 4, 23 (Jan. 15, 1947) (publ. by Council for Social Action of the Congregational Christian Churches); National Urban League, "Racial Problems in Housing," Bull. No. 2 (Fall, 1944) p. 15; Weaver, "A Tool for Democratic Housing," The Crisis, vol. 54, No. 2, p. 47, 48 (Feb. 1947). This depression of values is only temporary, induced by the panic. As soon as the neighborhood stabilizes itself, the general excess of demand for Negro housing over supply restores the values to a level usually higher than the former white market. Lester Velie, "Housing: Detroit's Time Bomb," *Colliers*, November 23, 1946, p. 16.

the world over are turned upon us to see how the people of the most powerful of the United Nations are dealing *at home* with a major problem of race relations." [118] He thus highlighted the fact that racial segregation and discrimination in the United States are widely advertised throughout the world [119] and embarrass the conduct of foreign affairs of the United States. For it must be remembered that the "white" peoples constitute a minority of the peoples of the world.[120] The international aspects of racial discrimina-

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[118] Foreword by Mr. Keppel in Gunnar Myrdal, "An American Dilemma, The Negro Problem and Modern Democracy," p. viii (1944).

[119] "To Secure These Rights," The Report of the President's Committee on Civil Rights, p. 147 (Govt. Printing Office 1947). The following Associated Press dispatch appeared in *The Evening Star*, of Washington, D. C. (p. A-24, August 21, 1947):

"RUSSIAN NEWSPAPER HITS TREATMENT OF NEGROES HERE

(By the Associated Press)

"MOSCOW, Aug. 21.—The newspaper Trud said today that Negroes in Washington were 'prohibited from attending movies, restaurants, barber shops and beaches where whites were present.'

"'Let us remember, this is all taking place in the city which, according to reference books, is the residence of the President and the Capitol building in which Congress sits,' the article continued.

"Trud asked:

"'Will Washington "democrats" dare restrict the Liberian ambassador to movies and restaurants only in the Negro ghetto?'"

The New York Times (June 2, 1947, Editorial Page, p. 24, "Missionaries of Prejudice"), commented as follows on a dispatch from Sweden concerning a fight in the Port of Malmoe, Sweden when American sailors from Texas attempted to impose their social code against American Negro sailors from another ship at a Swedish dance hall: ". . . the communist newspapers in Russia will play it up . . . the sailors from Texas have made the task of winning converts to American ideals of democracy just that much harder."

[120] See the November 1942 issue of 31 *Survey Graphic*, entitled "Color: Unfinished Business of Democracy," dealing with racial problems and attitudes both in the United States and throughout the world. The fact is that "In many countries the color of a man's skin is little more important than the color of his hair and in many others the favored color is not white." Justice Edgerton, dissenting below (R. 432; 162 F. (2d) 233, 245).

tion are summarized in the Final Report (June 28, 1946) of the Fair Employment Practice Committee (p. 6):

"Expert testimony in a FEPC hearing in September 1943 showed that Berlin and Tokyo used racial incidents in the United States as anti-American propaganda to the colored peoples of Asia and to Europe.

"During the war the Mexican Chamber of Deputies, the counterpart of our House of Representatives, established a special committee 'for the purpose of keeping the attention of the Mexican Congress focused on discrimination against Mexicans in the United States.' Mexico also placed restrictions on our importation of badly needed Mexican labor because of American discriminatory practices.

"The Congress of the Inter-American Bar Association held in Mexico City in August 1944 took notice of discrimination as an international problem in the Western Hemisphere. All except three Latin-American republics, through their representatives, went on record as condemning discrimination and passed a resolution recommending to the governments of the American republics that a treaty be entered into pledging each country not to permit the citizens of other American states to be discriminated against within its territory.

"At the first London meeting of the United Nations, charges of discrimination against South American nationals were raised against the United States.

"The fact that foes have used our discriminatory practices against us, and friends have chided us for uncorrected discrimination, suggests the importance of coming with clean hands into the council of a world composed two-thirds of colored peoples."

The international repercussions of racial discrimination in the United States have posed major problems for the States adjoining Mexico,[121] and even more for the United

[121] The Attorney General of the State of California stated that the agreement between the United States and Mexico for the importation of Mexican agricultural labor during World War II was frustrated by the

States as a whole. On several occasions, a majority of the nations in the United Nations Assembly have joined in voting against the United States when issues of racial discrimination were involved.[122] Acting Secretary of State Dean Acheson stated,[123] on May 8, 1946, that—

> "the existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries. We are reminded over and over by some foreign newspapers and spokesmen, that our treatment of various minorities leaves much to be desired. While sometimes these pronouncements are exaggerated and unjustified, they all too frequently point with accuracy to some form of discrimination because of race, creed, color, or national origin. Frequently we find it next to impossible to formulate a satisfactory answer to our critics in other countries; the gap between the things we stand for in principle and the facts of a particular situation may be too wide to be bridged. An atmosphere of suspicion and resentment in a country over the way a minority is being treated in the United States is a formidable obstacle to the development of mutual understanding and trust between the two countries. We will have better international relations when these reasons for suspicion and resentment have been removed.
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> "I think that it is quite obvious . . . that the existence of discriminations against minority groups in the United States is a handicap in our relations with other countries. The Department of State, therefore, has good reason to hope for the continued and increased

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widespread discrimination practiced against Mexican agricultural workers in Texas. Hon. Robert W. Kenny, "The Inter-American Bar and Racial Equality," 4 Lawy. Guild Rev., No. 4, pp. 7, 8 (July-Aug. 1944).

[122] Ferdinand Kuhn, Jr. "Working Backstage at U. S. Expense—Red 'Tolerance' Pose is Winning Colonials," *The Washington Post*, sec. II, p. 1-B (Sunday, Nov. 2, 1947).

[123] Letter to the Fair Employment Practice Committee, quoted in the Final Report of June 28, 1946, by the F.E.P.C., p. 6; also quoted in "To Secure These Rights," The Report of the President's Committee on Civil Rights, pp. 146-147 (Govt. Printing Office, 1947).

effectiveness of public and private efforts to do away with these discriminations."

The issuance of an injunction by a duly constituted court in the United States enforcing the segregation intended by a racial restrictive covenant, "no matter what gloss be given it, amounts to official" government action imposing a discrimination solely on the basis of race, and the world so views it.[124] Particularly does such action appear symbolic of the Nation when it occurs in the District of Columbia, the Capital of the Nation.[125] But it is more than symbolism alone. Visiting personages and officials of foreign nations have personally noted, and often suffered from, racial restrictions which prevent their occupying residences in the District of Columbia,[126] as well as in other major cities of the Nation. With the increasing number of such visitors, these restrictions assume even greater importance in the foreign relations of the United States. "The nation as a whole would be held to answer."[127] As the President's Committee on Civil Rights has said in its Report ("To Secure These Rights") (p. 148): "*The United States*

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[124] See *United States* v. *Pink*, 315 U. S. 203, 232.

[125] See Joseph D. Lohman and Edwin R. Embree, "The Nation's Capital," 36 Survey Graphic p. 33 (Jan. 1947).

[126] "To Secure These Rights," The Report of the President's Committee on Civil Rights, p. 95 (Govt. Printing Off., 1947).

[127] *United States* v. *Pink*, 315 U. S. 203, 232; *Chy Lung* v. *Freeman*, 92 U. S. 275, 279; *cf. United States* v. *California*, 331 U. S. ———, 67 Sup. Ct. 1658; *In re Drummond Wren*, [1945] 4 Dom. L. R. 674 (Supreme Court of Ontario). On November 9, 1947, the Minister of Agriculture of the Republic of Haiti, coming to a national Agriculture Conference in the United States, was refused lodging "for reason of color." He withdrew from the Conference, and announced that his Government may lodge a formal protest to the Department of State. *The Washington Post*, p. 11 (Nov. 13, 1947); *The New York Times*, p. 15 (Nov. 13, 1947). Trade relations between India and the Union of South Africa were recently severed because of the current dispute concerning the treatment of colored people in South Africa. See *The New York Times*, p. 13 (Nov. 13, 1947).

is not so strong, the final triumph of the democratic ideal is not so inevitable that we can ignore what the world thinks of us or our record."

(b) Racial Restrictive Covenants Are Widespread, Capricious, Extreme; They Create a Divisive, Caste Society, and Constitute a Direct Danger to Our National Unity.

Restrictive covenants, which have already forced Negroes into American ghettoes outside of which they are not permitted to live, have also been directed against many other racial and religious groups.[128] The only standards and limits of these covenants have been the caprice and prejudice of the persons creating the covenants. Thus, covenants have been applied in the United States against persons of Mexican, Armenian, Hindu, Ethiopian, Japanese, Chinese, Korean, Arabian, Filipino, Persian, Syrian, Greek or Spanish ancestry, as well as "non-Caucasians", Latin Americans, Jews, American Indians, Hawaiians, Puerto Ricans, and other groups, irrespective of their American citizenship or the use they would make of the land. There have been covenants against sale to or occupancy

> "by Greeks, Assyrians or by any person who belongs to any race, creed or sect which holds, recognizes or observes any day of the week other than the first day of the week to be the Sabbath or his Sabbath, or any corporation or clan composed of or controlled by any such person";[129]

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[128] Charles Abrams, "Homes for Ayrans Only," *Commentary*, p. 241 (May, 1947).

[129] Covenants covering the Prospect Hills subdivision in Roanoke, Virginia; see Loren Miller, "The Power of Restrictive Covenants," 36 Survey Graphic 46 (Jan. 1947).

"descendants of former residents of the Turkish Empire";[130]

"Jews or persons of objectionable nationality";[131]

"persons of a race whose death rate is at a higher rate than that of the white or Caucasian race";[132]

"any person of the Semitic Race, blood, or Jews, Hebrews, Persians, and Syrians".[133]

Many of these covenants provide that the restriction does not apply to occupancy by the restricted persons if they are there as domestic servants.[134]

The extremes to which these covenants have been pushed is illustrated by the currently notorious cases of *Garber* v. *Tushin* in Bethesda, Maryland,[135] and *Pearce* v. *Crocker*, in Hollywood, California.[136]

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[130] See D. O. McGovney, "Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional," 33 Calif. L. Rev. 5, 15 (1945); Loren Miller, "Race Restrictions on Ownership or Occupancy of Land," 7 Lawy. Guild Rev. 99 (May-June 1947).

[131] This covenant was involved in a Canadian case: *In Re Drummond Wren* [1945] 4 Dom. L. R. 674 (Supreme Court of Ontario).

[132] Declaration of covenant dated Nov. 17, 1936, recorded by Waldo M. Ward on Nov. 25, 1936, Liber 648, folio 192, affecting lots in Northwood Park, Montgomery County, Maryland.

[133] Covenant covering Bannockburn Heights development, Maryland, involved in *Garber* v. *Tushin*, Circuit Ct. of Montgomery County, Maryland, cited in the next two footnotes.

[134] Examples of such exception for servant occupancy are in the covenants in the *Tushin* and *Crocker* cases, cited in the next two footnotes, and in the covenant involved in *Trustees of the Monroe Avenue Church of Christ* v. *Perkins*, No. 153, Oct. Term, 1947, U. S. Supreme Court. See also D. O. McGovney, "Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional," 33 Calif. L. Rev. 5, 15 (1945). This servant occupancy exception is a standard provision in the deeds issued by many real estate developers. See Covenants of Chevy Chase Land Co. of Montgomery County, Md., on block 7, Section 5-A, Chevy Chase, Maryland, Plat 1371, recorded in Plat Book 22.

[135] *Garber* v. *Tushin*, Equity 12894, Circuit Ct. of Montgomery County, Maryland, complaint filed April 11, 1947. See *The Washington Post*, pp. 1, 3 (Sept. 17, 1947).

[136] *Pearce* v. *Crocker*, in the Superior Court of California in Los Angeles (No. 508,294).

In the *Tushin* case, the plaintiffs sought an injunction to prevent Mrs. Tushin, who is non-Jewish and against whom the covenant admittedly does not apply, from permitting her husband, who is Jewish, to occupy the home which they own. Presumably their three minor children would also be subject to ouster with him. In the *Crocker* case, the plaintiffs obtained a judgment of eviction which prevents Mr. Crocker, a white man against whom the covenant does not apply, from permitting his wife (a ¾ Seneca Indian) and their three daughters to reside with him in the home which Mr. and Mrs. Crocker own. A Notice of Appeal in the *Crocker* case was filed on November 4, 1947. In both cases, the plaintiffs, alleging that the continuing occupancy of Mr. Tushin and Mrs. Crocker, respectively, was causing the plaintiffs "irreparable damage," were asking the court to separate man and wife and children!

The *Tushin* and *Crocker* cases thus go beyond the notorious Nazi "Nuremberg Laws" under which none of the members of a similar mixed-marriage family would have been required under Nazi-German law, solely because of their race or creed, to move from their home.[137]

The results of continued judicial enforcement of these covenants were vividly appraised by Justice Mackay of the Supreme Court of Ontario:[138]

> ". . . the consequences of judicial approbation of such a covenant are portentous. If sale of a piece of land can be prohibited to Jews, it can equally be prohibited to Protestants, Catholics or other groups or denominations. If the sale of one piece of land can be so prohibited, the sale of other pieces of land can likewise be prohibited. In my opinion, nothing could be more cal-

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[137] *Nazi Conspiracy and Aggression*, vol. 3, pp. 607-608, Part B, I 1a; vol. 4, pp. 10-11 (1939) Reichsgesetzblatt, Part 1, p. 864) Art. 7, sec. 1 (Govt. Printing Off., 1946).

[138] *In re Drummond Wren*, 4 Dom. L. R. 674 [1945], Ontario Reports [1945] 778, 783 (invalidating a restrictive covenant against Jews).

culated to create or deepen divisions between existing religious and ethnic groups in this province, or in this country, than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas, or conversely, would exclude particular groups from particular business or residential areas."

Indeed, if people may be restricted from land occupancy because of their racial or ethnic ancestry (*e.g.* Negroes, American Indians, Hawaiians, Filipinos, Mexicans, Chinese, etc.), and if people may be so restricted because of their religion (*e.g.*, Jews, Catholics, Mormons, Seventh Day Adventists, etc.), similar restrictive covenants could be applied to registered Democrats or registered Republicans, to Masons, to union men or to non-union men, to foreign-born people whether American citizens or not, and to stockbrokers, bankers or even lawyers. Each of these groups has at times been the object of resentment or prejudice by sizable portions of many communities. And if it is lawful for courts to enforce private conspiracies designed to deprive a racial, ethnic or religious group of housing, *i.e.*, shelter, would it be less lawful similarly to deprive such groups of food or clothing? "Housing is a necessary of life," said Mr. Justice Holmes in *Block* v. *Hirsh*, 256 U. S. 135, 156 (1921). It is as much a necessity for members of a racial or religious minority as it is for all others.

Prior to World War I, there was little enforced residential segregation in the District of Columbia,[139] or even in cities like Chicago where the Negro ghetto is today surrounded by an iron band of restrictive covenants.[140] Judi-

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[139] *The Washington Post*, editorial page (Oct. 25, 1947) (letter of Ethel Graham-Greene).

[140] Robert C. Weaver, "Hemmed In," p. 1 (Amer. Council on Race Rel., Chicago, 1945); St. Clair Drake and Horace Cayton, "Black Metropolis," p. 176 (1945): "In 1910 there were no communities [in

cial decisions enforcing such covenants have lent legal sanctions and the appearance of respectability to residential segregation. Realtors have pledged themselves in their "Code of Ethics" to enforce racial residential segregation. Section 5, paragraph 15, "Code of Ethics" of Washington Real Estate Board (Def. Exh. No. 5; R. 274). Recent newspaper reports of neighborhood association meetings indicate active and systematic efforts to extend the covenants to land not now covered.[141] If covenants continue to receive judicial sanction and enforcement, all indications are that "in a single generation, all new homes in the nation may be barred to designated minorities—what is more, probably will be."[142] Indeed, it may take even less than a generation. The lingering doubt as to the enforceability of the covenants has heretofore often served as a deterrent to their creation. If they are now held enforceable, that deterrent would be removed, and, with the impetus which such a decision by this Court would give to the creation of covenants, covenanting would approach a seamless pattern.

Equally sinister implications exist in the restriction which provides that members of designated races and creeds may not seek accommodations as individuals, but may live in the community only if they become domestic servants.

Chicago] in which Negroes were over 61% of the population. More than ⅔ of the Negroes lived in areas less than 50% Negro, and a third lived in areas less than 10% Negro. By 1920, 87% of the Negroes lived in areas over half Negro in composition. A decade later 90% were in districts of 50% or more Negro concentration. Almost ⅔ (63%) lived where the concentration was from 90% to 99% Negro."

[141] *The Evening Star*, Washington, D. C. (Nov. 9, 1947), p. A-19; (Sept. 23, 1947) p. A-4; (Oct. 7, 1947) editorial page; (Oct. 8, 1947) p. A-6; (Oct. 14, 1947) p. A-6; (Oct. 16, 1947) p. A-6; (Oct. 21, 1947) p. A-14; *The Washington Post*, (Oct. 15, 1947) p. 1, 11; (Sept. 18, 1947) p. 1; (Nov. 9, 1947) pp. 1, 4M.

[142] Charles Abrams, "Homes for Aryans Only," *Commentary*, pp. 421, 422 (May, 1947).

(c) Religious and Moral Aspects.

Racial restrictive covenants have been described in a leading Catholic journal as "contracts to sin."[143] Bishop Bernard J. Sheil of Chicago has said that ". . . restrictive covenants . . . are diametrically and blatantly opposed to every concept of Christian ethics."[144] On October 17, 1947, the American Unitarian Association General Conference overwhelmingly approved a resolution condemning segregation as "a violation of the principles implicit in the fatherhood of God and the brotherhood of man."[145] On March 7, 1946, the Postwar Conference of the Federal Council of the Churches of Christ in America stated that the Federal Council "renounces the pattern of segregation in race relations as unnecessary and undesirable and a violation of the Gospel of love and human brotherhood."[146]

The Catholic church has attacked segregation and called upon Catholics to "join with their neighbors in helping to integrate Negro residents on the basis of good neighborliness."[147] Leaders of Jewish organizations have condemned

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[143] John Doebele, "Covenant to Create Slums," 75 America 90 (Catholic Review of the Week) (May 4, 1946).

[144] Bishop Bernard J. Sheil, "Restrictive Covenants versus Brotherhood," Address at Conference for the Elimination of Restrictive Covenants, held in Chicago May 10-11, 1946, printed in *Racial Restrictive Covenants*, pamphlet issued by Chicago Council Against Racial and Religious Discrimination, 123 W. Madison St., Chicago, p. 30. Bishop Sheil further said: "The God-given right of every human being to an existence on a plane equal to his dignity as a child of God must of necessity be our guiding rule. Yet, the whole theory of restrictive covenants ruthlessly ignores this divinely ordained principle." p. 28.

[145] *The Evening Star*, Washington, D. C., Oct. 18, 1947, p. A-7.

[146] Biennial Report (1946), Federal Council of Churches of Christ in America, p. 50. This statement was adopted by the General Council of the Congregational Christian Churches of the United States meeting at Grinnell, Iowa, in June, 1946. 13 Social Action 27 (Jan. 15, 1947) (published by Council for Social Action of the Congregational Christian Churches).

[147] National Catholic Welfare Conference, Washington, "Seminar in Negro Problems in the Field of Social Action," p. 33 (1946).

restrictive covenants as "pernicious", "shocking examples of un-American bigotry."[148]

(5) THIS COURT'S DECISION DECLARING RACIAL RESTRICTIVE COVENANTS UNENFORCEABLE WILL NOT CAUSE REVOLUTIONARY DISTURBANCES.

A hue and cry will be raised in some quarters that outlawing restrictive covenants will ruin property values, lead to race riots and wreak havoc generally in the community.[149] The Record in these cases puts the lie to these arguments. Respondents themselves admit that they have had no trouble with the petitioners whom they seek to evict (R. 83-84, 93, 135, 219, 243, 297); that their peace of mind has not been disturbed (R. 206); and that Hurd (the Mohawk Indian), the Negro petitioners, and the other Negro inhabitants of the block keep up their properties (R. 94, 202, 205, 311). It is undisputed that property in the neighborhood has a 30% greater market value when sold to Negroes than to whites (R. 118, 157, 261-263, 340). Plaintiffs sought and obtained the injunctions in the cases at bar, not on the facts, but on their prejudices[150] (R. 38, 39, 98, 206, 298-299).

The people who see the end of the white race in America if restrictive covenants are outlawed have their minds already made up and closed. They are the same people or same type of people who predicted chaos when this Court was called on to rule in *Missouri ex rel. Gaines* v. *Canada*,

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[148] Rabbi Paul Richman, Washington B'nai B'rith Anti-Defamation League, *The Evening Star*; Washington, D. C., p. A-14 (Sept. 13, 1947); Justice Meier Steinbrink, national chairman, Anti-Defamation League, B'nai B'rith, *The Washington Post*, p. 2B (October 7, 1947); Hymen Goldman, President, Jewish Community Council of Washington, *The Washington Post*, editorial page (Oct. 7, 1947).

[149] *The Washington Post* (November 9, 1947) pp. 1, 4M: "500 Attend Rally to Prevent Sale of Homes to Negroes."

[150] Significantly, the trial court in its findings of fact made no reference to depreciation of property values or any other kind of damage to plaintiffs (R. 379-383).

305 U. S. 337, that a Negro could not be excluded from a State university if he desired to take a course offered there to white students but not offered elsewhere in the State to Negroes. They predicted that political revolution and election by bullet instead of by ballot would result from this Court's decision in the Texas white primary case, *Smith* v. *Allwright*, 321 U. S. 649, forbidding denial to Negroes of the right to vote in a primary which is an essential part of the electoral process. They predicted wholesale riots when this Court ruled that a State "Jim-Crow" law did not apply to interstate bus passengers. *Morgan* v. *Virginia*, 328 U. S. 373. Yet their phobias turned out to be fantasies in those cases.

Similarly, there is no cause for alarm here.

The first question which may properly be asked those who see disaster unless restrictive covenants are enforced is: what kept the communities stabilized before the device of restrictive covenants was evolved. Restrictive covenants are a comparatively recent development. The first reported case involving a Negro was in 1915.[151] Restrictive covenants came into prominence as "private zoning ordinances" only after this Court in 1917 struck down public zoning ordinances against Negroes in *Buchanan* v. *Warley*, 245 U. S. 60. Before then, equilibrium was obtained thru the operation of the natural laws governing city growth and population movement. These same laws will be in constant operation after "private zoning" thru restrictive covenants is sent the same way that public zoning was in *Buchanan* v. *Warley* (R. 337, 338, 350-353).

The unfortunate truth is that Negro ghettoes will not disappear overnight if judicial enforcement of restrictive covenants is denied. The fringe and vulnerable areas on the fringe will be immediately affected, but the general

[151] *Queensborough Land Co.* v. *Cazeaux*, 136 La. 724, 67 So. 641 (1915).

characteristics of the city's residential districts will show no perceptible immediate change. Nobody will be forced to sell; and the buyer must still be ready, able and willing to buy. All that elimination of restrictive covenants will do is to remove an intolerable, artificial restrictive barrier [152] and permit the functioning of the economic and social forces which affect and control city growth.[153]

C. THIS COURT HAS NOT HERETOFORE DECIDED THE QUESTIONS WHICH ARE HERE PRESENTED—ANALYSIS OF CORRIGAN v. BUCKLEY, 271 U. S. 323 (1926).

Only two cases involving racial restrictive covenants have heretofore been decided by the Supreme Court of the United States.[154] One was decided solely on the question whether a judgment in a prior collusive suit to enforce the covenant was *res judicata* as to persons not parties to that collusive suit.[155] The other was *Corrigan* v. *Buckley*, 271 U. S. 323 (1926).

The erroneous impression that this Court has ruled on the questions here urged is based on misinterpretation of

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[152] *Grady* v. *Garland*, 67 App. D. C. 73, 89 F 2d 817, at 819: "It furnishes a complete barrier against the eastward movement of colored population into the restricted area—a dividing line."

[153] "Both the buildings and the people are always growing older. Physical depreciation of structures and the aging of families constantly are lessening the vital powers of the neighborhood. Children grow up and move away. Houses with increasing age are faced with higher repair bills . . . These internal changes due to depreciation and obsolescence in themselves cause shifts in the location of neighborhoods." Homer Hoyt, "The Structure and Growth of Residential Neighborhoods in American Cities" (Federal Housing Administration, 1939) p. 121.

[154] This Court has denied petitions for writs of certiorari in several prior cases involving racial restrictive covenants. But as this Court has said (Justice Holmes): "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States* v. *Carver*, 260 U. S. 482, 490; *Atlantic Coast Line R. R. Co.* v. *Powe*, 283 U. S. 401, 403, 404.

[155] *Hansberry* v. *Lee*, 311 U. S. 32.

Corrigan v. *Buckley*. In that case, Corrigan, Buckley and others had executed an agreement that no part of the properties covered would be sold to, or occupied by, Negroes. Later, Corrigan contracted to sell one of the lots to Curtis, a Negro. To enforce the covenant, Buckley filed a bill in equity in the trial court of the District of Columbia to enjoin Corrigan from selling, and Curtis from buying, occupying or selling, the lot. The defendants moved to dismiss on the sole ground that the "covenant is void," because in conflict with the Constitution and the laws of the United States and with public policy. No other issue was presented by the pleadings or the arguments in the lower courts. No question was raised as to the constitutional propriety of judicial enforcement of the covenant. These motions were overruled, the injunction was granted, and the Court of Appeals affirmed.

Corrigan v. *Buckley* reached the Supreme Court on *appeal* not on certiorari. Section 250 of the Judicial Code as it then read authorized appeals in six types of cases, including (Third) "cases involving the construction or application of the Constitution of the United States . . ." and (Sixth) "cases in which the construction of any law of the United States is drawn in question by the defendant." Act of March 3, 1911, 36 Stat. 1087, 1159. The defendants based their appeal solely on the contention that the *covenant* was "void" because it violated the 5th, 13th and 14th Amendments, because it was contrary to public policy; and because it was forbidden by Sections 1977, 1978, 1979, Rev. Stats.[156] This Court specifically stated: "Under the plead-

[156] 271 U. S. 323, 328-329: "The defendant Corrigan moved to dismiss the bill on the grounds that the 'indenture or covenant made the basis of said bill' is (1) 'void in that the same is contrary to and in violation of the Constitution of the United States,' and (2) 'is void in that the same is contrary to public policy.' And the defendant Curtis moved to dismiss the bill on the ground that it appears therein that the indenture or covenant 'is void, in that it attempts to deprive the defendant, the said Helen

ings in the present case the only constitutional question involved was that arising under the assertions in the motions to dismiss that the indenture or covenant which is the basis of the bill, is 'void' in that it is contrary to and forbidden by the Fifth, Thirteenth and Fourteenth Amendments." 271 U. S. 323, 329-330.

The Supreme Court held: *First*, that the 5th and 14th Amendments dealt only with governmental action, not with actions of private persons; that the 13th Amendment dealt only with involuntary servitude; and therefore that the contention that these Amendments made *the covenant void* raised no substantial question, 271 U. S. 323, 330. *Secondly*, the Supreme Court decided that the contention "that the indenture is void as being 'against public policy,' does not involve a constitutional question within the meaning of the" appeal provisions of the Judicial Code. 271 U. S. 323, 330. *Thirdly*, the Supreme Court held that Secs. 1977, 1978 and 1979, Rev. Stats. did not prohibit or invalidate contracts entered into between private persons concerning their property, saying: "There is no color for the contention that they rendered the indenture void. . . . We therefore conclude that neither the constitutional nor statutory questions relied on as grounds for the appeal to this Court have any substantial quality or color of merit, or afford any jurisdictional basis for the appeal." 271 U. S. 323, 331. This Court, therefore, dismissed the appeal for want of jurisdiction and without implying that the judgment appealed from was right. In fact, since this Court had no jurisdiction, it

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Curtis, and others of property, without due process of law; abridges the privilege and immunities of citizens of the United States, including the defendant, Helen Curtis, and other persons within this jurisdiction [and denies them] the equal protection of the law, and therefore, is forbidden by the Constitution of the United States, and especially by the Fifth, Thirteenth, and Fourteenth Amendments thereof, and the Laws enacted in aid and under the sanction of the said Thirteenth and Fourteenth Amendments' . . . namely, sections 1977, 1978, 1979 of the Revised Statutes."

cannot be said to have given final consideration to any question not involved in reaching that conclusion. It is plain, therefore, that this Court decided only (a) that the *creation* by private parties of racial restrictive covenants does not violate the Constitution or Secs. 1977, 1978 and 1979, Rev. Stats. and (b) that the contention that a contract was against public policy was not an adequate basis for an *appeal* under the Judicial Code.

No contention that either the Constitution or Sec. 1978, Revised Statutes, prohibited *judicial enforcement by injunction* of such covenants was raised by any pleading in any court, nor was it in fact even considered by either the District Court or the Court of Appeals. Nevertheless, the appellants undertook, by brief and argument, to raise that question in this Court. This Court said (271 U. S. 323, 331-332):

> "And, while it was further urged in this Court that the *decrees of the courts below in themselves* deprived the defendants of their liberty and property without due process of law, in violation of the Fifth and Fourteenth Amendments, this contention likewise cannot serve as a jurisdictional basis for the appeal. Assuming that such a contention, if of a substantial character, might have constituted ground for an appeal under paragraph 3 of the Code provision, *it was not raised by the petition for the appeal or by any assignment of error, either in the Court of Appeals or in this Court;* and it likewise is lacking in substance. The defendants were given a full hearing in both courts; they were not denied any constitutional or statutory right; and there is no semblance of ground for any contention that the decrees were so plainly arbitrary and contrary to law as to be acts of mere spoliation. See *Delmar Jockey Club* v. *Missouri, supra,* [210 U. S. 324] 335. Mere error of a court, if any there be, in a judgment entered after a full hearing, does not constitute a denial of due process of law. *Central Land Co.* v.

Laidley, 159 U. S. 103, 112; *Jones* v. *Buffalo Creek Coal Co.*, 245 U. S. 328, 329.

"It results that, in the absence of any substantial constitutional or statutory question giving us jurisdiction of this appeal under the provisions of § 250 of the Judicial Code, *we cannot determine upon the merits the contentions earnestly pressed by the defendants in this court that the indenture is not only void because contrary to public policy, but is also of such a discriminatory character that a court of equity will not lend its aid by enforcing the specific performance of the covenant.* These are questions involving a consideration of rules not expressed in any constitutional or statutory provisions, but claimed to be a part of the common or general law in force in the District of Columbia; and, plainly, they may not be reviewed under this appeal unless jurisdiction of the case is otherwise acquired.

"Hence, *without a consideration of these questions, the appeal* must be, and is *Dismissed for want of jurisdiction.*" (Emphasis supplied.)

The Court thus expressly left open the questions that the covenant is void because contrary to public policy, and that it is also of such a discriminatory character that a court of equity will not lend its aid by enforcing the covenant.

Furthermore, the statement in *Corrigan* v. *Buckley*—"and it likewise is lacking in substance"—to the contention thus raised for the first time (that the decrees themselves were unconstitutional) was plainly mere *dictum*, since this Court had ruled that there was no jurisdiction to consider the merits of the case and since that question was not in any event properly in that case. Furthermore, it is quite clear, from the references to "a full hearing" in the Court's comment on the question, that the Court had in mind solely issues of procedural due process, and did not adequately consider the requirements of substantive due process with

respect to a case properly raising the question of the constitutionality of judicial enforcement of a racial restrictive covenant. *Corrigan* v. *Buckley* therefore does not constitute a prior adjudication of the issues now presented to this Court. In fact, if anything, the Court's precise distinction between a contention that the "covenant is void" and a contention that "the decrees of the courts below in themselves" violated the due process clause indicates that the Court recognized that holding that the Constitution and the Revised Statutes did not make the covenant "void" for the purpose of conferring jurisdiction of an appeal, still left open the further issue of the constitutionality of the decrees enforcing the covenant, albeit the decision shows no evidence of having viewed the latter issue as involving substantive as well as procedural due process. The Court's *dictum*, however, was entirely and plainly irrelevant to the decision; it was pronounced without any consideration of the severe and widespread harms resulting from the enforcement of such covenants; and for the reasons here presented it was in any event a mistaken view if construed as sanctioning the judicial enforcement of a racial restrictive covenant. Furthermore, the consequences of such judicial enforcement of restrictive covenants have become much more serious and acute since the Court uttered its *dictum*. They now endanger the health, morals and welfare of a large portion of our population and imperil our national unity. These evil effects have been further intensified by the increased urbanization of Negroes and the widespread imposition of racial restrictive covenants. See Part I B of this brief. Therefore upon this full examination of the merits of the question, now for the first time properly presented to this Court, we urge this Court to declare that *dictum* bereft of any vitality.

The principal question here presented (that the *judicial enforcement* of a racial restrictive covenant is unconstitu-

tional) has, in fact, rarely been raised or decided even in the State and lower Federal courts. *Gandolfo* v. *Hartman*, 49 Fed. 181 (1892), the earliest reported case involving such a covenant, held that its judicial enforcement would be unconstitutional.

The next reported decision involving a restrictive covenant (*Queensborough Land Co.* v. *Cazeaux*, 136 La. 724, 67 So. 641), was in 1915. That decision, and almost all subsequent decisions by State and lower Federal courts involving restrictive covenants, did not pass on the question whether the *judicial enforcement* of racial restrictive covenants was compatible with the Constitution. The language of the opinions indicates that counsel generally failed to spell out the constitutional issues, in terms of governmental action through judicial enforcement, and contented themselves, instead, with the argument that the covenants themselves (the creation of the covenants alone) violated constitutional guarantees.[157] So put, their arguments did not adequately raise the issue of the constitutionality of *government action through judicial enforcement* of the covenant but rather was directed against the action of the covenantors as individuals. Hence the State and lower Federal court decisions have generally brushed aside such arguments with the simple statement, as in the *Queensborough Land Co.* case, that "The Fourteenth Amendment, in so far as prohibiting discrimination against the negro race, applies only to state legislation, not to the contracts of individuals." 136 La. 724, 728, 67 So. 641, 643.

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[157] Harold I. Kahen, "Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem," 12 U. of Chi. L. Rev. 198, 199-200 (Feb. 1945).

The issue of the constitutionality of *judicial enforcement* of racial restrictive covenants appears to have been raised and decided only in the following cases:

a. *Judicial enforcement held unconstitutional:*

(1) *Gandolfo* v. *Hartman*, 49 Fed. 181.

(2) *Anderson* v. *Auseth*, L.A. No. 19,759 ("Sugar Hill" case), in Superior Court of California in Los Angeles, December, 1945, decision by Judge Clark, reported in *Architectural Forum*, Jan. 1946 ("Good Neighbors").

(3) *Wright* v. *Drye*, in Superior Court of California in Los Angeles, October, 1947, decision by Judge Mosk, reported in *Chicago Defender*, pp. 1, 6 (Nov. 1, 1947).

b. *Judicial enforcement held not unconstitutional:*

(1) *Title Guarantee & Trust Co.* v. *Garrott*, 42 Calif. App. 152, 154, 183 Pac. 470, 471 (1919).

(2) *Kraemer* v. *Shelley*, — Mo. —, 198 S. W. (2d) 679, 683 (1946) (now before this Court, No. 72, Oct. Term, 1947).

(3) *Sipes* v. *McGhee*, 316 Mich. 614, 25 N. W. (2d) 638, 644 (1947) (now before this Court, No. 87, Oct. Term, 1947).

c. *Contention urged, but ignored by court, that judicial enforcement is unconstitutional.*

The respondents' brief in opposition to the petitions for certiorari in the cases at bar states that the contention against the constitutionality of judicial enforcement of racial restrictive covenants was raised in the following cases and "Although urged strongly in each case, the point was ignored by the Court" (Respondent's brief in opposition, p. 7):

(1) *Corrigan* v. *Buckley*, 271 U. S. 323 (1926) (issue not properly raised; case dismissed for want of jurisdiction; discussed and fully analyzed above in this brief).

(2) *Hundley* v. *Gorewitz*, 77 App. D. C. 48, 132 F. (2d) 23 (1942) (enforcement of covenant refused on ground of change of neighborhood).

(3) *Mays* v. *Burgess*, 79 App. D. C. 343, 147 F. (2d) 869 (1945) (urged in appellant's brief; ignored by court which, in fact, stated that appellant urged that "the covenant . . . violates the constitution," 147 F. (2d) at 870).

It is plain that these few decisions do not constitute an "overwhelming" number of State or lower Federal court decisions against the contention that *judicial enforcement* of racial restrictive covenants is unconstitutional.

II

JUDICIAL ENFORCEMENT OF A RESTRICTIVE COVENANT WHICH, SOLELY ON THE BASIS OF RACE, FORBIDS A CITIZEN FROM PURCHASING AND OCCUPYING LAND FOR RESIDENTIAL PURPOSES, VIOLATES SECTION 1978, REVISED STATUTES (8 U. S. C. SEC. 42).

Section 1978, Revised Statutes, 8 U. S. C. Sec. 42, provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

This statute, applicable to the District of Columbia over which Congress has at least the power of a State legislature,[158] applies to all citizens and to all property in the District and requires the courts of the District to recognize and protect those rights. The very essence of the statute is that it renders entirely immaterial the question whether a citizen is "white" as a basis for determining who has and who has not the rights to purchase, hold and sell prop-

[158] *Cf. Talbott* v. *Silver Bow County*, 139 U. S. 438, 444; *Geofroy* v. *Riggs*, 133 U. S. 258.

erty, and thus forbids the courts of the District from looking to the color or "white"-ness of a citizen as a basis for denying those rights to any citizen.

The Petitioners are citizens of the United States (R. 380; 169, 215, 226, 238, 307). White citizens admittedly have the right to purchase the property here involved from willing sellers and to hold it. The injunction which the District Court issued denies that right to the grantee petitioners *solely on the basis that they are not "white."* The District Court, an arm of the Government, has therefore denied to them "the same right . . . as is enjoyed by white citizens," to purchase and hold any parcel of the large amount of land in the District which is covered by covenants similar to the covenant here involved. The injunction also denies to petitioner Urciolo and to other owners of covenanted land the right to convey their property to any buyer, irrespective of his race or color, although white citizens owning other real property in the District may exercise such right to convey their property to any buyer.

This Court held in *Buchanan* v. *Warley*, 245 U. S. 60, that enforcement of a municipal ordinance directed toward the same end and operating on the same basis as this covenant would violate this statute.[159] The enforcement of

[159] This Court stated, in *Buchanan* v. *Warley:* "The Statute of 1866, originally passed under sanction of the Thirteenth Amendment, 14 Stat. 27, and practically reenacted after the adoption of the Fourteenth Amendment, 16 Stat. 144, [Section 1978, Revised Statutes, 8 U. S. C. 42] expressly provided that all citizens of the United States in any State shall have the same right to purchase property as is enjoyed by white citizens. Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color. *Hall* v. *DeCuir*, 95 U. S. 485, 508. These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. *Civil Rights Cases*, 109 U. S. 3, 22. The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color." (245 U. S. 60, 78-79.)

this covenant by the judicial arm of the Government violates the statute just as plainly, since, solely on the basis that a person is not "white," the court thus denies to some citizens "the same right . . . as is enjoyed by white citizens" to purchase, hold and sell real property, although the statute confers that right on "all citizens."

III

JUDICIAL ENFORCEMENT OF A RESTRICTIVE COVENANT WHICH, SOLELY ON THE BASIS OF RACE FORBIDS A PERSON FROM PURCHASING AND OCCUPYING LAND VIOLATES A TREATY OF THE UNITED STATES, NAMELY, THE CHARTER OF THE UNITED NATIONS.

The Charter is a treaty of the United States ratified by the Senate (59 Stat. 1031), under the Treaty power of the Constitution (Article VI) which provides that "all treaties made . . . under the authority of the United States, shall be the supreme law of the land." The Charter provides that "the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race" and that "all Members pledge themselves to take joint and separate action" for that purpose. Articles 55 (c), 56 (59 Stat. 1031, 1045-1046).

Even if the United States Government must affirmatively implement the Charter in order to outlaw private discriminations by individuals against other persons on account of their race, the solemn pledge by the United States Government that it will "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race" plainly and directly requires the *Government* to refrain from impairing "human rights and fundamental freedoms" on racial distinctions.

This necessarily means that the *Government* (whether acting through its legislative, judicial, or executive arm) may not impose, or lend its aid to, discriminations depriving any person of his human rights and fundamental freedoms because of his race. There is a sharp distinction between racial discrimination which is *purely private*, and racial discrimination which is directly caused or aided by the *Government* through any of its agencies.

One of the most fundamental of human rights and freedoms is the right and freedom to acquire a home and to live in it.[160] When the judicial arm of the Government of the United States, purporting to exercise discretionary power, enforces a restrictive covenant which, solely on the basis of race, forbids a person to purchase and occupy land for residential purposes, such action clearly violates the Government's obligation under the Charter not to lend its aid to such racial discriminations.[161] The supremacy of this Treaty precludes the specific enforcement in any court

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[160] The human rights provision of the United Nations Charter includes the right to acquire adequate housing. See January 1946 issue of 243 *Annals of the American Academy of Political and Social Science* on "Essential Human Rights," particularly Edward R. Stettinius, Jr., "Human Rights in the United Nations Charter," p. 1; Charles E. Merriam, "The Content of an International Bill of Rights," p. 11; American Law Institute, "Statement of Essential Human Rights," p. 18, 24. The Institute's formulation of the right to adequate housing is as follows: "Article 14. Food and Housing. Everyone has the right to adequate food and housing. The state has a duty to take such measures as may be necessary to insure that all its residents have an opportunity to obtain these essentials." The committee appointed by the American Law Institute to formulate the Statement of Essential Human Rights contained United States, Arabic, British, Canadian, Chinese, French, pre-Nazi German, Italian, Indian, Latin American, Polish, Soviet Russian, and Spanish representatives (p. 18). A detailed comment on the human right to adequate housing is set forth in C. Wilfred Jenks, "The Five Economic and Social Rights," 243 Annals, etc., *supra*, pp. 40, 43-45.

[161] The Preamble of the Charter proclaims the determination of the Peoples of the United Nations "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity

of the United States of a covenant whose objective is contrary to the objectives of the Treaty. *Kennett* v. *Chambers*, 55 U. S. (14 How.) 38. In that case, General Chambers of the revolutionary army which sought to sever Texas from Mexico, in order to secure funds for the Texas revolutionists against Mexico, had made a contract in Ohio, with citizens of the United States for the sale of his land in Texas, although at that time there were subsisting between the United States and Mexico a treaty of limits under which Texas was recognized as a part of Mexican territory, and a treaty of amity. A suit was later brought for specific enforcement of the contract to convey the land. This Court denied specific enforcement of the contract, holding that it was void because its objectives were inconsistent with the treaties. In *United States* v. *Pink*, 315 U. S. 203, 231-233, this Court held the courts of New York lacked power to deny enforcement of a claim where such refusal was inconsistent with the national policy as expressed in a Presidential Agreement with the Government of Russia. Thus, the courts lack power either to enforce a claim (as in *Kennett* v. *Chambers*), or to deny enforcement to a claim (as in *United States* v. *Pink*), where such enforcement or denial of enforcement would be inconsistent with the policy and objectives of a treaty of the United States. Further examples of this principle are *Gandolfo* v. *Hartman*, 49 Fed. 181, in which specific enforcement of a restrictive covenant against occupancy of residential land by Chinese was re-

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and worth of the human person, in the equal rights of men and women . . . and for these ends to practice tolerance and live together in peace with one another as good neighbors . . ." The human rights provisions designed to achieve these ends are essential to the success of the United Nations and the prevention of future wars. Henri Bonnet, "Human Rights are Basic to Success of United Nations," 243 *Annals of the American Academy of Political and Social Science*, p. 6 (Jan. 1946). As such, they "properly pertain to our foreign relations" and the treaty provisions concerning them therefore override any conflicting laws or policies. *Santovincenzo* v. *Egan*, 284 U. S. 30, 40.

fused because the objectives of the covenant were contrary to a subsisting treaty between the United States and China; and the case of *In re Drummond Wren* (1945), 4 Dom. L. R. 674, Ont. Rep. (1945) 778, Ont. Wkly. Notes (1945) 795, in which the Supreme Court of Ontario held that it would not enforce a covenant against the occupancy of residential lands by Jews because the objectives of the covenant are contrary to the objectives of the United Nations Charter to which Canada is a signatory. Even if there were any possible doubt, which there is not, as to the precise limits of the area intended to be covered by the human rights provisions of the Charter, it must, since it is a treaty of the United States, "be liberally construed so as to affect the apparent intention of the parties" to the treaty. *Nielsen* v. *Johnson*, 279 U. S. 47, 51.

IV

RACIAL RESTRICTIVE COVENANTS AND THEIR ENFORCEMENT BY THE COURTS ARE SO PLAINLY CONTRARY TO THE PUBLIC POLICY OF THE UNITED STATES THAT THE JUDGMENTS OF THE COURT BELOW SHOULD BE REVERSED BY THIS COURT.

Racial restrictive covenants, and their enforcement by the courts, are contrary to the traditional and official public policy of the United States against discrimination based on race or religion, expressed in the Declaration of Independence, the Constitution, statutes, treaties, decisions of this Court, and pronouncements of the President of the United States.[162] Moreover, the effect of restrictive cove-

[162] The incompatibility between the enforcement of these racial restrictive covenants and the national public policy of the Federal Government is pithily illustrated in a recent comment by Mr. Winthrop W. Aldrich, Chairman of the Board of Trustees of the American Heritage Foundation. This Foundation is sponsoring the year-long tour of the *Freedom Train* carrying to some 300 cities the Declaration of Independence, the Constitu-

nants is detrimental to the health, safety and morals of the community and hence contrary to public policy even without regard to such official expressions.

(A) *Declaration of Independence.* The most quoted sentence in the Declaration is: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness."

(B) *Constitution.* The Constitution, in several provisions,[163] embodies the national policy against discrimination on racial grounds. Furthermore, this Court's decision in *Buchanan* v. *Warley*, 245 U. S. 60, that the Constitution forbids legislation restricting the sale and occupancy of land solely on the basis of race, obviously indicates that the Constitution embodies a national policy against racial restrictive covenants and against their enforcement by a court to achieve the very same end forbidden to the legislature.

(C) *Statutes.* The national public policy against racial discrimination has been reflected in numerous acts of Congress, including statutes explicitly directed against the restrictions here involved. Section 1978, Revised Statutes, 8 U. S. C. Sec. 42 (which restates a portion of the act of April 9, 1866, 14 Stat. 27, Chap. 31) provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property." See *Buchanan* v. *Warley*, 245 U. S. 60,

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tion, and other documentary milestones in our history of freedom. Commenting on the Foundation's ruling that "no segregation of any individuals or groups of any kind on the basis of race or religion be allowed at any exhibition of the Freedom Train held anywhere," Mr. Aldrich said: "... *any other course was unthinkable.*" See *The Evening Star*, Washington, D. C., p. A-4, September 29, 1947.

[163] U. S. Constitution, Amendments 5, 13, 14 (Sec. 1) and 15 (Sec. 1).

78-79. This national public policy has been reiterated in Federal legislation designed to eliminate racial or religious discrimination with regard to making and enforcing contracts;[164] the right to sue, be parties and give evidence;[165] security of person and property;[166] penalties, taxes and licenses;[167] administration of the homestead laws;[168] the elective franchise;[169] civilian pilot and nurses training;[170]

[164] Act of April 9, 1866 (14 Stat. 27, Chap. 31) from which Sections 1977 and 1978, Revised Statutes (8 U.S.C., Secs. 41 and 42), were derived. Section 1977, Rev. Stat., provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." The Act of May 31, 1870 (16 Stat. 140, Chap. 114, Sec. 16), reenacted, after the adoption of the Fourteenth Amendment in 1868, that part of the Act of April 9, 1866, which was subsequently embodied in Section 1977, Rev. Stat.

[165] See footnote 164, *supra;* also Act of July 2, 1864 (13 Stat. 351, Chap. 210, s. 3, Rev. Stat. s. 858) which provided "that in the Courts of the United States there shall be no exclusion of any witness on account of color . . ."; the Act of March 2, 1867 (14 Stat. 457, Chap. 166, s. 2) extended this provision to the Court of Claims and is now embodied in Sec. 1078, Revised Statutes (28 U.S.C. Sec. 292).

[166] Note 164, *supra.*

[167] Note 164, *supra.*

[168] Act of June 21, 1866 (14 Stat. 66, 67, Chap. 127) provided that in administering the homestead laws, "no distinction or discrimination shall be made . . . on account of race or color." It is now embodied in sec. 2302, Rev. Stat., 43 U.S.C. 184.

[169] Act of May 31, 1870 (16 Stat. 140, Chap. 114, Sec. 1), subsequently reenacted as Sec. 2004, Revised Statutes (8 U.S.C. 31), guaranteed the right to vote at all elections "without distinction of race, color, or previous condition of servitude"; Act of Jan. 25, 1867 (14 Stat. 379), reenacted as Sec. 1860, Revised Statutes (48 U.S.C. Sec. 1460), forbade "denial of the elective franchise in any of the Territories of the United States . . . on account of race, color, or previous condition of servitude."

[170] Act of June 27, 1939 (53 Stat. 855, 856, 49 U.S.C. sec. 752) provided that in the civilian pilot training program "none of the benefits of training or programs shall be denied on account of race, creed, or color;" Act of June 15, 1943 (57 Stat. 153, 50 U.S.C. App., sec. 1451) provided that in the nurses training program "there shall be no discrimination in the administration of . . . this Act on account of race, creed, or color."

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jury service;[171] federal employment;[172] private employment during World War II;[173] work relief[174] and public works.[175]

Moreover, Section 20 of the Criminal Code (Act of March 4, 1909, 35 Stat. 1088, 1092), 18 U. S. C. Sec. 52, Revised Statutes, Sec. 5510, makes it a crime for anyone, "under color of any law, statute, ordinance, regulation, or custom, wilfully" to deprive anyone of his "rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or [to subject him] to different punishments, pains, or penalties . . . by reason of his

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[171] Act of March 1, 1875 (18 Stat. 336, Sec. 4, 8 U.S.C., sec. 44) forbidding discrimination as to qualification for jury service, reenacted in Sec. 2 of Act of June 30, 1879 (21 Stat. 43, 44).

[172] Act of Feb. 28, 1919 (40 Stat. 1189, 1201, Chap. 69) prohibited discrimination, except for veteran's preference, in the expenditure of funds for roads; Act of Nov. 26, 1940 (54 Stat. 1211, 1214, Chap. 919, Sec. 3e, 5 U.S.C. 681e) (Ramspeck Act) prohibited discrimination in the classified civil service on account of race, creed or color; Foreign Service Act of Aug. 13, 1946 (60 Stat. 999, 1030; 22 U.S.C. sec. 807) prohibited "discrimination against any person on account of race, creed or color" in carrying out the Foreign Service Act.

[173] Appropriations for Committee on Fair Employment Practices: see Act of June 28, 1944 (58 Stat. 533, 536); Act of December 22, 1944 (58 Stat. 853, 874); and Act of July 17, 1945 (59 Stat. 473).

[174] Act of March 31, 1933 (48 Stat. 22, 23) (public works unemployment relief): ". . . in employing citizens for the purposes of this Act, no discrimination shall be made on account of race, color, or creed"; Act of June 28, 1937 (50 Stat. 319, 320, 16 U. S. C. 584g): "No person shall be excluded [from Civilian Conservation Corps] on account of race, color, or creed." Criminal sanctions were imposed upon those depriving anyone of work relief benefits "on account of race, creed, color" under the Act of Aug. 2, 1939 (53 Stat. 1147, 1148, 18 U. S. C. sec. 61c) or depriving anyone of emergency relief benefits "on account of race, religion, or political affiliations" under the act of June 29, 1937 (50 Stat. 352, 357). Similar prohibitions were contained in the Emergency Relief Appropriation Acts of June 21, 1938 (52 Stat. 809, 815); June 30, 1939 (53 Stat. 927, 937); June 26, 1940 (54 Stat. 611, 623); July 1, 1941 (55 Stat. 396, 405, 406); and July 2, 1942 (56 Stat. 634, 643); and in the National Youth Administration Appropriation Acts of June 26, 1940 (54 Stat. 574, 593); July 1, 1941 (55 Stat. 466, 491); and July 2, 1942 (56 Stat. 562, 575).

[175] Act of June 28, 1941 (55 Stat. 361, 363, 42 U. S. C. 1533) provided that in determining need for public works, "no discrimination shall be made on account of race, creed, or color."

color, or race, than are prescribed for the punishment of citizens." Section 19 of the Criminal Code, 18 U. S. C. Sec. 51, Revised Statutes, Sec. 5508 (providing criminal penalties where "two or more persons conspire to injure, oppress . . . any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . ."), has been held to apply to agreements between persons to keep Negroes from the right to lease and cultivate lands. *United States* v. *Morris*, 125 Fed. 322; see also *United States* v. *Waddell*, 112 U. S. 76; *Ex parte Yarbrough*, 110 U. S. 651. Other sections of the Criminal Code punish "offenses against the elective franchise and civil rights of citizens."[176]

(D) *Treaties and International Agreements.* This national policy against racial discrimination is further expressed in the treaties and international agreements of the United States. (a) By adherence to the Charter of the United Nations,[177] the United States pledged itself to "promote * * * universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race." (b) The Potsdam Agreement[178] specifically provided that "All Nazi laws which . . . established dis-

[176] Criminal Code, Secs. 21 to 26, being, respectively, reenactments of Secs. 5518 and 5528 through 5532, Revised Statutes (18 U. S. C. Secs. 54 through 59).

[177] Ratified by the Senate, 59 Stat. 1031, 1045-46. On Nov. 19, 1946, the General Assembly of the United Nations adopted a Resolution that "it is in the higher interests of Humanity to put an immediate end to religious and so-called racial persecutions and discrimination, and calls on the Governments and responsible authorities to conform both to the letter and to the spirit of the Charter of the United Nations, and to take the most prompt and energetic steps to that end." Resolution of General Assembly, 48th plenary meeting, 19 Nov. 1946 (Journal of the United Nations, No. 75, Supple. A-64, Add. 1, page 957).

[178] White House News Release, Aug. 2, 1945, Part III, A. 4, reprinted in *Voices of History, 1945-46*, p. 394, 397 (Nathan Ausubel, ed., Gramercy Publishing Co., N. Y. 1946).

crimination on grounds of race, creed, or political opinion shall be abolished. No such discriminations, whether legal, administrative or otherwise, shall be tolerated." (c) In the treaties of February 10, 1947, with the satellite Axis nations, of Italy, Rumania, Bulgaria, and Hungary, this country was particularly careful to incorporate guarantees of nondiscrimination against racial minorities.[179] (d) When the Act of Chapultepec was adopted by the United States and the Latin American Nations at the International Conference on Problems of War and Peace, at Mexico City, Mexico, these nations unanimously adopted Resolution No. 41 on March 7, 1945, reaffirming the principle "of equality of rights and opportunities for all men, regardless of race or religion" and that their governments shall "prevent in their respective countries all acts which may provoke discrimination among individuals because of race or religion."[180] (e) The Atlantic Charter deals with the rights of "all peoples" and "all men."[181]

The Supreme Court of Ontario has held, in reliance on the United Nations Charter as indicating the public policy of Canada which had subscribed to the Charter, that restrictive covenants prohibiting the alienation of land to "Jews or persons of undesirable nationality" are invalid. *In re Drummond Wren* [1945], 4 Dom. L. Rep. 674.

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[179] *Making the Peace Treaties, 1941-1947* (Dept. of State publication 2774, European Ser. 24), pp. 6-9, 32 (1947); 16 Dept. of State Bull. 1077, 1080, 1081, 1082 (June 1, 1947); 93 Cong. Rec. 6307, 6567, 6573, 6578. These treaties were ratified by the Senate on June 5, 1947. 93 Cong. Rec. 6567, 6573, 6578, 6584.

[180] Report of the Delegation of the United States of America to the Inter-American Conference on Problems of War and Peace, Mexico City, Mexico, Feb. 21-March 8, 1945 (Dept. of State Publ. 2497, Conference Series 85) p. 109; *The New York Times*, p. 9, March 7, 1945.

[181] President Roosevelt's Message of August 21, 1941, conveying Statement by the Prime Minister of England and the President of the United States, H. Doc. 358, 77th Cong., 1st session.

(E) *Decisions of this Court:* The opinions of this Court, particularly in recent years, have eloquently expressed the national policy against racial discrimination. Illustrative are the following decisions: *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 203: ". . . discriminations based on race alone are obviously irrelevant and invidious." Justice Murphy concurring (at p. 208): "The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it whenever it appears in the course of a statutory interpretation." *Korematsu* v. *United States*, 323 U. S. 214, 216: ". . . to begin with . . . all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." *Hirabayashi* v. *United States*, 320 U. S. 81, 100: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Smith* v. *Texas*, 311 U. S. 128, 130: "For racial discrimination . . . in . . . jury service . . . is at war with our basic concepts of a democratic society and a representative government." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374: ". . . hostility to the race . . . to which the petitioners belong . . . in the eye of the law is not justified. The discrimination is, therefore, illegal. . . ." *Edwards* v. *California*, 314 U. S. 160, 185 (Justice Jackson concurring): Race, creed or color is a "neutral fact—constitutionally an irrelevance."

(F) *The President:* Ever since President Washington characterized the newly formed government of the United States as one that "gives to bigotry no sanction, to persecution no assistance," [182] our Chief Executives have often given expression to the public policy which he so clearly enunciated. Equally clearly have our Presidents applied that tradition to the right to a decent home. Thus, in his Message to Congress on January 11, 1944, President Roosevelt said: [183]

> ". . . . We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed.
>
> "Among these are—. . . The right of every family to a decent home; . . . ."

President Truman enunciated this principle even more explicitly on June 29, 1947, as follows: [184]

> "There is no justifiable reason for discrimination because of ancestry, or religion, or race, or color. We must not tolerate such limitations on the freedom of any of our people and on their enjoyment of the basic rights which every citizen in a truly democratic society must possess. Every man should have the right to a decent home • • • We must insure that these rights—on equal terms—are enjoyed by every citizen."

Presidential Executive orders have reinforced the na-

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[182] George Washington's Letter of August 1790 to the Hebrew Congregation in Newport, Rhode Island, 30 Washington's Letter Books 19.

[183] House Doc. No. 377, 78th Cong., 2nd Sess., p. 7, reprinted in *Voices of History, 1944-45*, p. 21, 26 (Nathan Ausubel, ed., Gramercy Publ. Co., N. Y., 1945).

[184] Address of President Truman, 38th Annual Conference of the National Association for the Advancement of Colored People, 93 Cong. Rec. A-3595 (July 2, 1947); *The Washington Post*, p. 4 (June 30, 1947).

tional policy against racial or religious discrimination in public employment and, during the war, in war industries.[185]

On December 5, 1946, President Truman created the President's Committee on Civil Rights to investigate and make recommendations "with respect to the adoption or establishment, by legislation or otherwise, of more adequate and effective means and procedures for the protection of the civil rights of the people of the United States."[186] The Committee's Report ("To Secure These Rights"), which, among other recommendations against racial discrimination, urged court attack on, and outlawing of, restrictive covenants, was presented to President Truman on October 29, 1947, who referred to it as "an American charter of human freedom in our time." *The New York Times*, p. C-14 (Oct. 30, 1947). And on November 10, 1947, the Attorney General, filing a motion in this Court for leave to argue in the cases at bar, stated: "The Government is of the view that judicial enforcement of racial restrictive

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[185] Executive Order No. 2000, July 28, 1914 (in making reductions in Government service, no discrimination shall be exercised for political or religious reasons); Executive Order No. 7915, June 24, 1938 (3 F.R. 1519) (prohibiting discrimination in executive civil service for political or religious reasons); Executive Order No. 8587, November 7, 1940 (5 F.R. 4445), prohibiting discrimination in executive civil service because of race or political or religious reasons; Executive Order No. 8802, June 25, 1941 (6 F.R. 3109) (as amended by Executive Orders No. 8823, July 18, 1941 (6 F.R. 3577); No. 9346, May 27, 1943 (8 F.R. 7183); and No. 9664, December 18, 1945, (10 F.R. 15301) (reaffirming policy of full participation in defense program by all persons, regardless of race, creed, color, or national origin; prohibiting any discrimination in employment in war industries or in Government by reason of race, creed, color or national origin; establishing a Committee on Fair Employment Practice); Letter of November 5, 1943, from the President to the Attorney General (8 F.R. 15419) (interpreting to be mandatory rather than directive, the requirement of Executive Order No. 9346, *supra*, that there be inserted in all Government contracts a provision obligating the contractor not to discriminate against any employee or applicant for employment on account of race, creed, color, or national origin, and requiring the contractor to include similar contractual provisions in all sub-contracts).

[186] Executive Order No. 9808, Dec. 5, 1946 (11 F.R. 14153).

covenants is contrary to the Fifth and Fourteenth Amendments of the Constitution, is in violation of specific provisions of the Civil Rights Act, and is contrary to the public policy of the United States." *The Washington Post*, pp. 1, 8 (Nov. 11, 1947).

(G) *Effect of Covenants.* Finally, aside from the express formulation of public policy set forth by the Declaration of Independence, by the Constitution, by statutes, by treaties, by decisions of this Court, and by the President of the United States, the drastic effects of restrictive covenants in accentuating the housing shortage for Negroes and confining them to wretched quarters in overcrowded ghettoes, with consequent jeopardy to the health, safety and morals of the community, indicate that such covenants, and their specific enforcement by the judicial arm of the Government, are contrary to the public policy of this country.[187]

The question whether restrictive covenants are void because contrary to public policy, was specifically left open in *Corrigan* v. *Buckley*, 271 U. S. 323, 332.

The law reports are replete with instances in which courts have refused, on grounds of public policy, to exert their powers against defendants even where a contract between the parties (which is not in any sense present here) was the alleged basis for seeking a judicial decree against one of the parties, and where the effect of such decree would be far less drastic than would result from enforcing a racial restrictive covenant.[188] In the light of these considerations of public policy, the judicial enforcement of racial restrictive covenants should not be countenanced by this Court.

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[187] *Gandolfo* v. *Hartman*, 49 Fed. 181; *In re Drummond Wren* (1945) 4 D. L. R. 674 (Ontario Supreme Court).

[188] *Kennett* v. *Chambers*, 55 U. S. (14 How.) 38; *Hyer* v. *Richmond Traction Co.*, 168 U.S. 471 (1897); *Beasley* v. *Texas & Pacific Railway Co.*, 191 U.S. 492 (1903); *McMullen* v. *Hoffman*, 174 U.S. 639 (1899);

V

BECAUSE OF THE DISCRIMINATORY CHARACTER AND INEQUITY OF THE RESTRICTIONS ON THE SALE, PURCHASE AND OCCUPANCY OF LAND SOLELY ON THE BASIS OF RACE, NO COURT OF EQUITY SHOULD LEND ITS AID TO THE ENFORCEMENT OF SUCH RESTRICTIONS BY ISSUANCE OF INJUNCTION.

Equitable relief is not a matter of right, but is addressed to the sound discretion of the court, and always with reference to the facts of the particular case.[189]

Courts of equity have traditionally asserted and exercised their powers to refuse equitable or injunctive relief if the granting of such relief would be against the best interests of the general public.[190] In addition, courts of equity

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Dr. Miles Medical Co. v. *Park & Sons Co.*, 220 U.S. 373 (1911); *Texas & Pac. Ry. Co.* v. *Marshall*, 136 U.S. 393 (1890); Gelhorn, "Contracts and Public Policy," 35 Colum. L. Rev. 678, 691, 692; Williston on Contracts, secs. 1652, 1652A, 1653 (Rev. ed., 1937); American Law Institute, *Restatement of the Law of Contracts*, vol. 2, secs. 512, 591 (1932). In *Ogden* v. *Saunders*, 25 U.S. (12 Wheat.) 213, 282 (1827), Justice Johnson, concurring, said: ". . . The Constitution was framed for society, and an advanced state of society, in which I will undertake to say that all the contracts of men receive a relative, and not a positive interpretation: for the rights of all must be held and enjoyed in subserviency to the good of the whole. The State construes them, the State applies them, the State controls them, and the State decides how far the social exercise of the rights they give us over each other can be justly asserted."

[189] *Pope Mfg. Co.* v. *Germully*, 144 U. S. 224, 237 (1892); *Hennessy* v. *Woolworth*, 128 U. S. 438, 442 (1888); *Jamison Coal and Coke Co.* v. *Goltra*, 143 Fed. 2d 889, 894, cert. denied 323 U. S. 769 (1944).

[190] In *Beasley* v. *Texas & Pacific R. Co.*, 191 U. S. 492, the plaintiff had conveyed land to a railroad on its agreement to build a depot thereon and its covenant not to build another depot within 3 miles. The plaintiff sought to enjoin the railroad's assignee from building another depot within 3 miles. In denying injunctive relief, this Court said (pp. 496-497): "Whatever the form which the attempt to restrict may take, obviously it is not desirable to allow large tracts of land to be tied up and cut off from the ordinary incidents of ownership, according to the invention of the owner, in perpetuity, in favor of other large tracts which may come by

have similarly refused to grant equitable or injunctive relief if, on a "balancing of the equities" of the parties, the hardship thereby inflicted on the respondent would greatly outweigh the benefits to the person who is attempting to invoke the equity powers of the court.[191] Where either or both of these circumstances are present, courts of equity have refused to lend their aid on the basis of broader considerations of public policy than the claimed right of the plaintiff to secure enforcement of his "rights" by a court of equity, and have left him to assert his damages, if any, in a court of law.

These doctrines of equity are plainly applicable to this case because the extreme hardship, which the injunctive

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division into many hands. . . . Assuming that a contract like the present is valid as a contract, and making the more debatable assumption that the burden of the contract passed to a purchaser with notice, it does not follow that such a contract will be specifically enforced. Illegality apart, a man may make himself answerable in damages for the happening or not happening of what event he likes. But he cannot secure to his contractor the help of the court to bring that event to pass, unless it is in accordance with policy to grant that help. To compel the specific performance of contracts still is the exception, not the rule, and courts would be slow to compel it in cases where it appears that paramount interests will or even may be interfered with by their action." See also *Norcross* v. *James*, 140 Mass. 188, 191-3, 2 N.E. 946, 948-9 (1885). In *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488 (1942), an injunction against a patent infringer was denied where the patentee was using its patent contrary to the public interest, even though there was no showing that the patentee was violating a statute or that the alleged infringer was harmed by the misuse of the patent. See also *Pope Mfg. Co.* v. *Gormully*, 144 U. S. 224 (1892). In *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334, 338 (1933) this Court refused to enjoin a city whose sewage disposal system created a nuisance on a private stock farm, since an injunction would cause the city "grossly disproportionate hardship" and "an important public interest would be prejudiced." See also *Texas & Pacific R. Co.* v. *Marshall*, 136 U. S. 393, 405 (1890).

[191] *Willard* v. *Taylor*, 75 U. S. (8 Wall.) 557 (1869); *Clarke* v. *Aiken*, 276 Fed. 21; *Coombs* v. *Lennox Realty Co.*, 111 Me. 178, 88 Atl. 477 (1913); *Madison* v. *Ducktown Sulphur, Copper & Iron Co.*, 113 Tenn. 331, 83 S.W. 658 (1904).

decrees inflict directly on the grantees [192] and indirectly on all members of the excluded group as well as the general community, clearly outweighs any benefit which the respondents may conceivably derive from injunctive enforcement of the covenant. Because of these covenants, together with the racial restrictive covenants on large amounts of other land, millions of American citizens are denied access to adequate housing. These covenants compel them to compete in an artificially restricted market and doom them to live in slums and substandard, overcrowded homes. The extent of this discrimination is utterly contrary to the historic genius of this great country. In racial covenant cases, courts have often refused to enforce the covenant if those whom it does not exclude would suffer a hardship.[193] It is much more compatible with the traditional scope of equity jurisprudence for the court of conscience to refuse enforcement of the restriction because of the hardship which would be suffered by those whom the covenant attempts to exclude.[194]

The question here urged was specifically left open by this Court in *Corrigan* v. *Buckley*, 271 U. S. 323, 332.

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[192] The record indicates that the grantees purchased their homes only after numerous hardships and prolonged unsuccessful efforts to obtain adequate housing. Several of the grantees had been evicted from their previous rented homes by the owners for their own occupancy. There is an acute shortage of housing for Negroes, even at prices inflated beyond those which white persons would have to pay. (R. 216-219, 227-228, 241, 260-64, 309-310, 334, 339, 340, 364.)

[193] *In Hundley* v. *Gorewitz*, 77 App. D. C. 48, 132 Fed. (2d) 23, 24 (1942) ("when . . . injunctive relief would not give a benefit but rather impose a hardship, the rule [as to injunctive relief] will not be enforced").

[194] Edgerton, J., dissenting in *Hurd* v. *Hodge*, 162 Fed. (2d) 233, 237 (1947) and in *Mays* v. *Burgess*, 147 Fed. (2d) 869, 870, 874 (1945); Traynor, J., concurring in *Fairchild* v. *Raines*, 25 Adv. Cal. 812, 151 P. (2d) 260, 267 (1944); *Arthur T. Martin*, "Segregation of Residences of Negroes," 32 Mich. L. Rev. 721, 724, 726, 738, 741 (1934); Harold J. Kahen, "Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem," 12 U. of Chi. L. Rev. 198, 206-209 (Feb. 1945).

VI

RACIAL RESTRICTIVE COVENANTS ARE UNREASONABLE RESTRAINTS ON ALIENATION OF PROPERTY AND VIOLATE THE FUNDAMENTAL PRINCIPLE OF OUR ECONOMIC SOCIETY THAT ALL PROPERTY BE FREELY ALIENABLE. HENCE, SUCH COVENANTS SHOULD BE HELD VOID AND UNENFORCEABLE.

The American Law Institute has pointed out that the basic principle of private property, in our economic society, is the freedom to alienate property. This principle is based ". . . in part upon the necessity of maintaining a society controlled primarily by its living members, in part upon the social desirability of facilitating the utilization of wealth, and in part upon the social desirability of keeping property responsive to the current exigencies of its current beneficial owners . . . Thus, to uphold them [restraints on alienation], justification must be found in the objective that is thereby sought to be accomplished or on the ground that the interference with alienation in the particular case is so negligible that the major policies furthered by freedom of alienation are not materially hampered."[195]

The American Law Institute lists six factors which tend, when present, to make restraints on alienation reasonable and valid:

> "1. the one imposing the restraint has some interest in land which he is seeking to protect by the enforcement of the restraint;
>
> 2. the restraint is limited in duration;

[195] American Law Institute, *Restatement of the Law of Property*, pp. 2379-80 (1944); see Gray, *Restraints on Alienation*, secs. 1-21 (2nd ed., 1895); Arthur T. Martin, "Segregation of Residences of Negroes," 32 Mich. L. Rev. 721, 734-741 (April, 1934).

3. the enforcement of the restraint accomplishes a worthwhile purpose;

4. the type of conveyances prohibited are ones not likely to be employed to any substantial degree by the one restrained;

5. the number of persons to whom alienation is prohibited is small . . . ;

6. the one upon whom the restraint is imposed is a charity."

Justice Edgerton, in his dissenting opinion in the court below (R. 420, 428), has analyzed the relationship of racial restrictive covenants to these six standards, as follows: [196]

"By these accepted standards, the covenants in suit are clearly unreasonable and void considered merely as restraints on the freedom of owners to alienate their property. Of the six favorable factors which the Institute enumerates, (1) only, if any, is present here. (2). The restraint is perpetual. (3). Enforcement of the restraint in this case does not accomplish its purpose of maintaining a white neighborhood and defeats its purpose of increasing the value of the property. Moreover, a purpose which, as *Buchanan* v. *Warley* holds, legislatures are constitutionally forbidden to accomplish, cannot be considered a 'worthwhile' purpose . . . instead of being worthwhile these covenants do great harm. (4). The 'type of conveyances prohibited' would be much 'employed . . . by the one(s) restrained,' for the record shows that the restricted property can be sold to Negroes for much more than whites will pay for it. (5). 'The number of persons to whom alienation is prohibited' is enormous. Such persons are more than a quarter of the population of the District of Columbia. In respect of the number of possible purchasers as well as the price which some of them are ready to pay, the landowners'

[196] 162 F. (2nd) 233, at p. 242.

market is most severely as well as permanently impaired. No other sort of restraint of any comparable degree of severity has ever been upheld."

The covenant here involved would prevent not only all Negroes, but also any other "colored person" from acquiring this land. This vague term could include many American citizens of American Indian,[197] Puerto Rican, Hawaiian, Filipino, Hindu, Chinese, Japanese, Mexican, Latin-American, Spanish, Cuban, Arab, and other ancestry. Probably 20,000,000 citizens of the United States are thus restricted from the purchase and sale of residential property.[198] The breadth of this restraint makes it plainly unreasonable, irrespective of whether the covenant is in the form of a restraint against the sale and transfer of the legal title, or in the form of a restraint on the use and occupancy of the property for residential purposes. Both technically and practically, each form of restraint is a restraint upon alienation. Since the rights of use and occupancy are major sticks in the bundle of legal rights known as a fee simple, the restriction against use and occupancy restricts the grantor's power of alienation. And since very few, if any, "Negroes or colored persons" invest in property which can because of restrictive covenants be used only by white people, a covenant which bars the use and occupancy of the property by "any Negro or colored person" effectively restrains its alienation to them. In *Buchanan* v. *Warley*, 245 U. S. 60, 73, involving a restriction against occupancy, this Court recognized that "In effect, premises situated as are those

[197] Petitioner Hurd, although found by the trial court to be a Negro, states that he is a Mohawk Indian (R. 238).

[198] In comparison, it may be noted that restraints on alienation have been held invalid where only two persons were excluded, *Jenne* v. *Jenne*, 271 Ill. 526, 111 N.E. 540; and where only the relatives of the testator and his widow were excluded, *Barnard's Lessee* v. *Bailey*, 2 Har. (Del.) 56 (1836).

in question in the so-called white block are effectively debarred from sale to persons of color, because if sold they cannot be occupied by the purchaser nor by him sold to another of the same color."

VII

COVENANTS RESTRICTING THE USE OF LAND ARE ENTIRELY DIFFERENT FROM COVENANTS WHICH, SOLELY ON THE BASIS OF RACE OR CREED, RESTRICT THE OCCUPANCY OF LAND. DECISIONS UPHOLDING THE FORMER ARE THEREFORE IRRELEVANT TO THE LATTER TYPE OF COVENANT.

It has been argued that since restrictions against the *use* of land for such purposes as distilleries, saloons, slaughterhouses, tanneries, stables, etc., are valid and enforceable, restrictive covenants against *occupancy* of the land by any member of a race of people are equally valid. There is, however, no similarity between these two kinds of uses, or between covenants making the respective restrictions.

A. *Constitutional differences.* The use of land for saloons, factories, slaughterhouses, etc. may be barred from residential districts by legislation,[199] and therefore, may be, and has been, barred by other forms of governmental action, including judgments by courts enforcing private covenants restricting such uses.[200] The occupancy of land by designated races or creeds, however, may not be barred by legislation,[201] and therefore it is equally unconstitutional for

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[199] *Reinman* v. *Little Rock*, 237 U. S. 171 (livery stables); *Hadacheck* v. *Los Angeles*, 239 U. S. 394 (brick factory); *Pierce Oil Corporation* v. *City of Hope*, 248 U. S. 498 (oil tanks); *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (comprehensive zoning of business and residential districts).

[200] *Cowell* v. *Springs Company*, 100 U. S. 55 (covenant against manufacture or sale of intoxicating liquors).

[201] *Buchanan* v. *Warley*, 245 U. S. 60; *Harmon* v. *Tyler*, 273 U. S. 668; *City of Richmond* v. *Deans*, 281 U. S. 704.

the government to bring about the very same result by any other form of governmental action.

B. *Different purposes and application.* The purpose of the covenants forbidding the use of land for saloons, factories, apartment houses, etc. is to limit or control the *use* of land. Such covenants affect only the use of the land and apply equally to all persons using the land. No person, irrespective of his race or creed, could operate a brewery on a tract covered by an appropriate covenant against breweries. Racial restrictive covenants, designed to segregate *peoples,* are, however, directed not against *use* of the property but against *occupancy by individuals* who will use the property, and does not apply to all persons equally. Yet the kind of *use* which would be made by the persons whom the racial restrictive covenants would permit to *occupy* the land, would concededly be identical with the use made by persons whom such covenants attempt to exclude.

C. *Different effects on property rights.* In our democratic society in which competition and private property are basic institutions, the right of the individual to own property is one of the fundamental rights of citizenship. This right to own real property includes the right to occupy that property. The use (or building) restriction covenants have never destroyed the right of ownership or the right of occupancy, but simply controlled the *use* to which the land was put by whoever owned or occupied the land. The racial restrictive covenants, however, do not affect the use to which the land is put by the unrestricted owner or occupant, and are directed solely to depriving (a) members of the proscribed group of their right to own and occupy the land, and (b) the landowner of his right either to sell his own land to members of the proscribed group or to permit them to occupy his land.

D. *Different effects on human rights.* The imposition of restrictions on uses of land *promotes* the human right of all peoples to live in a healthy, safe and uncongested residental neighborhood. The racial restrictive covenant, however, has precisely the opposite effect on the human right to adequate housing of a large proportion of the population,[202] although in no way does it make the racially covenanted property more healthful, safe, or uncongested for those whom it permits to live on the property.

E. *Different bases.* The validity and enforceability of *use* restrictions on land, pursuant to legislative zoning statutes [203] and pursuant to private covenants,[204] have been bottomed on the relevancy of these use restrictions to pub-

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[202] See section I B of this brief.

[203] In *Village of Euclid* v. *Ambler Realty Company*, 272 U. S. 365, involving the validity of an ordinance excluding industrial establishments from residential districts of the municipality, this Court stated: "The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare." (272 U. S. 365, 387.) This Court held the ordinance valid because it found "that the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community" (at p. 391), and that the ordinance was not "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" (at p. 395).

[204] *Cowell* v. *Springs Company*, 100 U. S. 55, 56, involved a condition in a conveyance "that intoxicating liquors should never be manufactured, sold, or otherwise disposed of as a beverage in any place of public resort on the premises." In upholding the validity of this covenant, this Court stated (100 U. S. 55, 57): "The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter-houses, soap-factories, distilleries, livery-stables, tanneries, and machine-shops have, in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residences of families. To hold that conditions for their exclusion from premises conveyed are inoperative, would defeat numerous arrangements in our large cities for the *health and comfort of whole neighborhoods.*

"The condition in the deed of the plaintiff against the manufacture or the sale of intoxicating liquors as a beverage at any place of public resort

lic health, safety, morals, and general welfare. This Court, however, has denied the right of legislatures to enact ordinances which, solely on the basis of race, prevent members of a designated race from acquiring and occupying land, holding that such ordinances have no relevancy to "the public health, convenience, or welfare." *Buchanan* v. *Warley*, 245 U. S. 60;[205] *Harmon* v. *Tyler*, 273 U. S. 668.[206] It is plain that the reason why legislative attempts to zone by race are in violation of due process, whereas legislative imposition of building or use restrictions are not, is precisely because racial zoning affects a class of persons solely on the basis of race whereas the building or use restrictions take no account of persons or their race by relate solely to the uses of the land. The same basic distinction exists between covenants which restrict certain *uses* of land by all persons and covenants which restrict the *occupancy* of land by certain persons solely on the basis of their race or creed.

Thus, any attempt to relate to this case the decisions upholding covenants merely restricting land *use*, not only

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on the premises, was not subversive of the estate conveyed. *It left the estate alienable and inheritable, and free to be subjected to other uses. It was not unlawful nor against public policy, but, on the contrary, it was imposed in the interest of public health and morality.*" (Emphasis supplied.)

[205] In *Buchanan* v. *Warley*, this Court said: "The disposition and use of property may be controlled in the exercise of the police power in the interest of the public health, convenience, or welfare. Harmful occupations may be controlled and regulated. Legitimate business may also be regulated in the interest of the public. Certain uses of property may be confined to portions of the municipality other than the resident district, such as livery stables, brickyards and the like, because of the impairment of the health and comfort of the occupants of neighboring property. Many illustrations might be given from the decisions of this court, and other courts, of this principle, *but these cases do not touch the one at bar.*" (245 U. S. 60, 74-75.) (Emphasis supplied.)

[206] In *Harmon* v. *Tyler*, this Court reversed a decision of the Supreme Court of Louisiana which had upheld a racial residential segregation ordinance as "only another kind of zoning ordinance." See *Tyler* v. *Harmon*, 158 La. 439, 104 So. 200, 206; *ibid*, 160 La. 943, 107 So. 704.

ignores the difference between *use* and *occupancy*, but also erroneously seeks to apply those decisions to justify governmental action through its judicial arm to achieve a result, against the will of willing sellers and willing buyers, which the government is forbidden to achieve through its legislative arm. In addition, it is plain that the two types of covenants (a) have fundamentally different purposes and application, (b) have different effects on property rights, (c) have different effects on human rights and (d) lack the main foundation for the use restrictions, namely, their relation to the public health, safety, morals and general welfare. Since there is no real similarity between the two types of covenants, decisions on the one type of covenant have no relevancy to the other type of covenant.

VIII

WORLD WAR II

A basic aim of the United States and the allied nations in World War II was the defeat of the same principle of racism which underlies the racial restrictive covenant in this case. To uphold this racial restrictive covenant would nullify the victories won by the United States and the allied nations at such great cost in that war, and deliberately ignore the tensions and misery which the exaltation of racism has imposed on the entire world.[207]

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[207] Professor Warren A. Seavey has concisely indicated the relationship of war to the treatment accorded to national minorities: ". . . we cannot permit the problems caused by the failure to deal justly with racial and religious minorities again to prove a catalyst for war, nor can we fail to realize that any claims of the white race to be a people set apart will bring disaster. We cannot long postpone the requirement of equal treatment for all. If nothing else has persuaded us, rocket propulsion and atomic bombing should convert us to the belief that we must now set our national and international houses in order." Warren A. Seavey, "International Protection of Basic Interests," 243 *Annals of the American Academy of Political and Social Science*, 50, 52 (Jan. 1946).

CONCLUSION

It is respectfully requested that this Court, for the reasons here urged, reverse the judgments of the court below.

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Attorneys for Petitioners.

Date: November 17, 1947.

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APPENDIX

Maps of DISTRICT OF COLUMBIA Showing Distribution of:

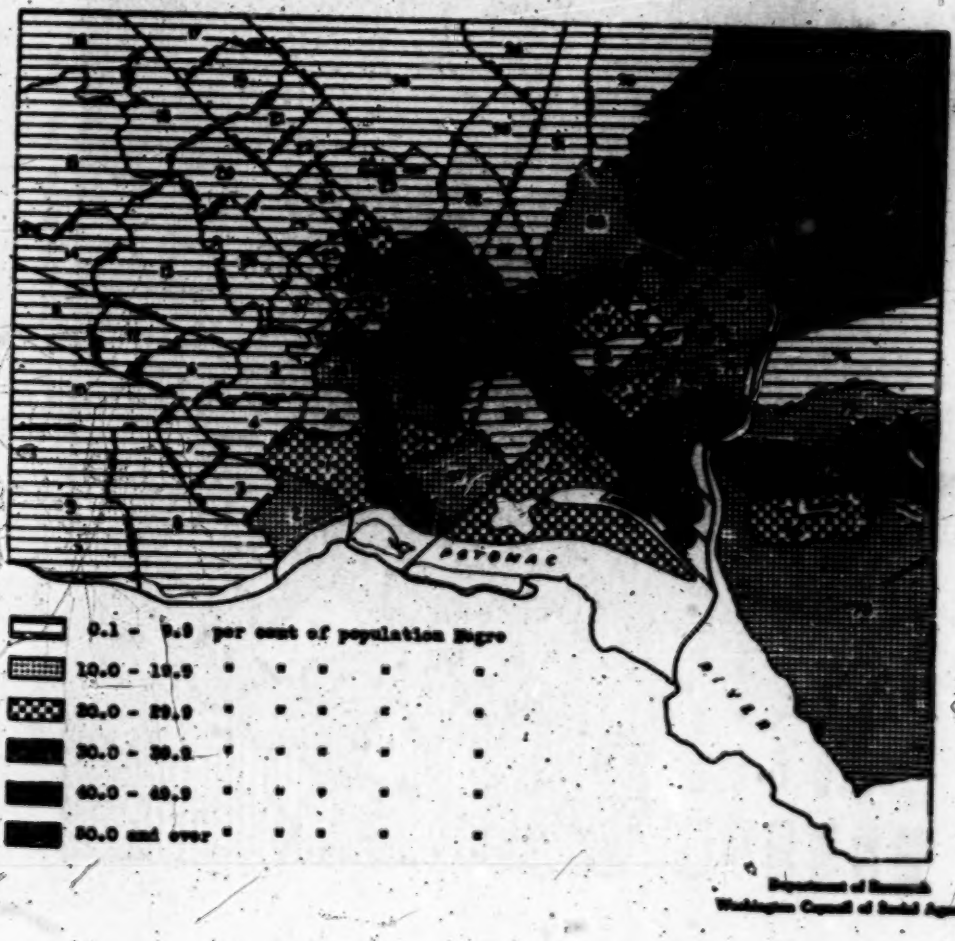
Charts No.

1. Percent of Population Negro, 1940.
2. Percent of Dwelling Units with 1.51 or more Persons per room, 1940.
3. Tuberculosis Death Rate (All Forms), 1940.
4. Infant Mortality Rate, 1937.
5. Total Arrests Made by Metropolitan Police During 1937 of Persons under 21 Years of Age.
6. Juvenile Court—Delinquent Children Committed to Institutions or Placed on Probation during 1937.
7. Number of children 5 to 18 years of age, inclusive, 1936-1938.
8. St. Elizabeth's Hospital Inmates (Patients admitted) 1937.

CHART 1

PERCENT OF POPULATION NEGRO, 1940

DISTRICT OF COLUMBIA



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DISTRICT OF COLUMBIA

PER CENT OF DWELLING UNITS WITH 1.51 OR MORE PERSONS PER ROOM, 1940

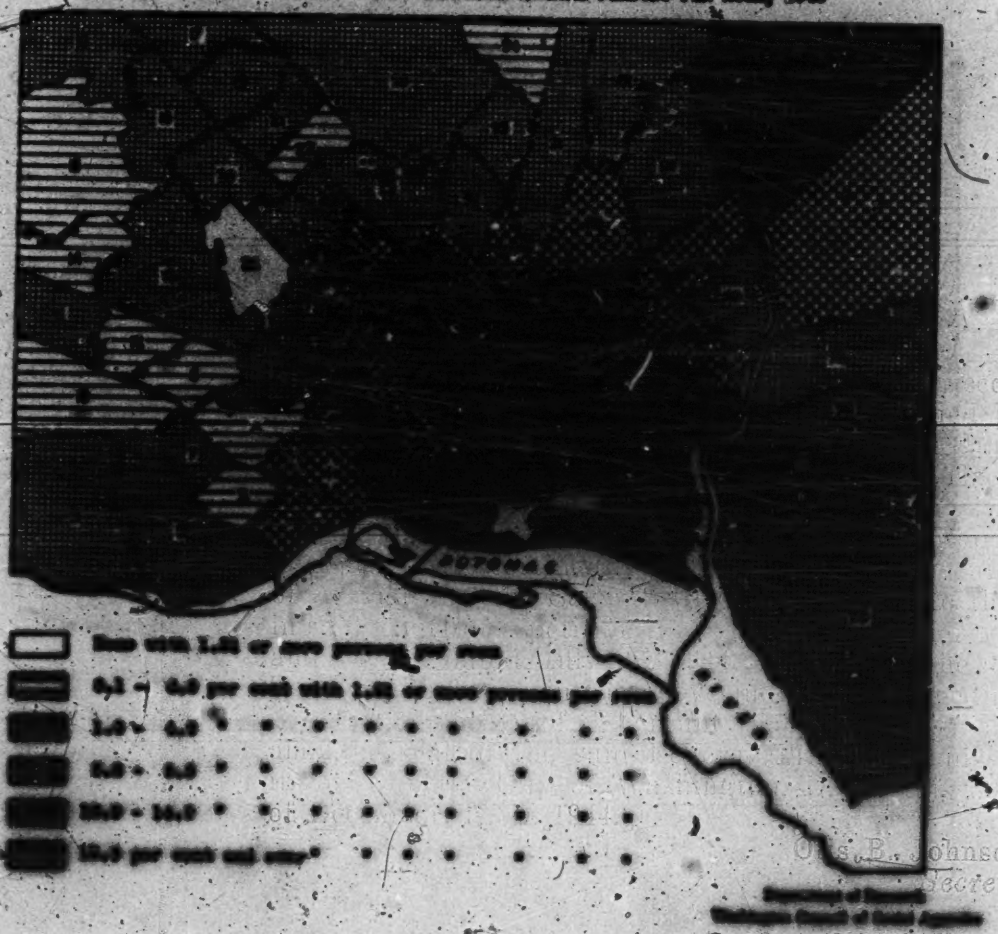

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CHART 1

TUBERCULOSIS DEATH RATE (ALL FORMS) IN THE DISTRICT OF COLUMBIA, 1940
(per 100,000 population)
(Census Tract of Residence of Deceased)

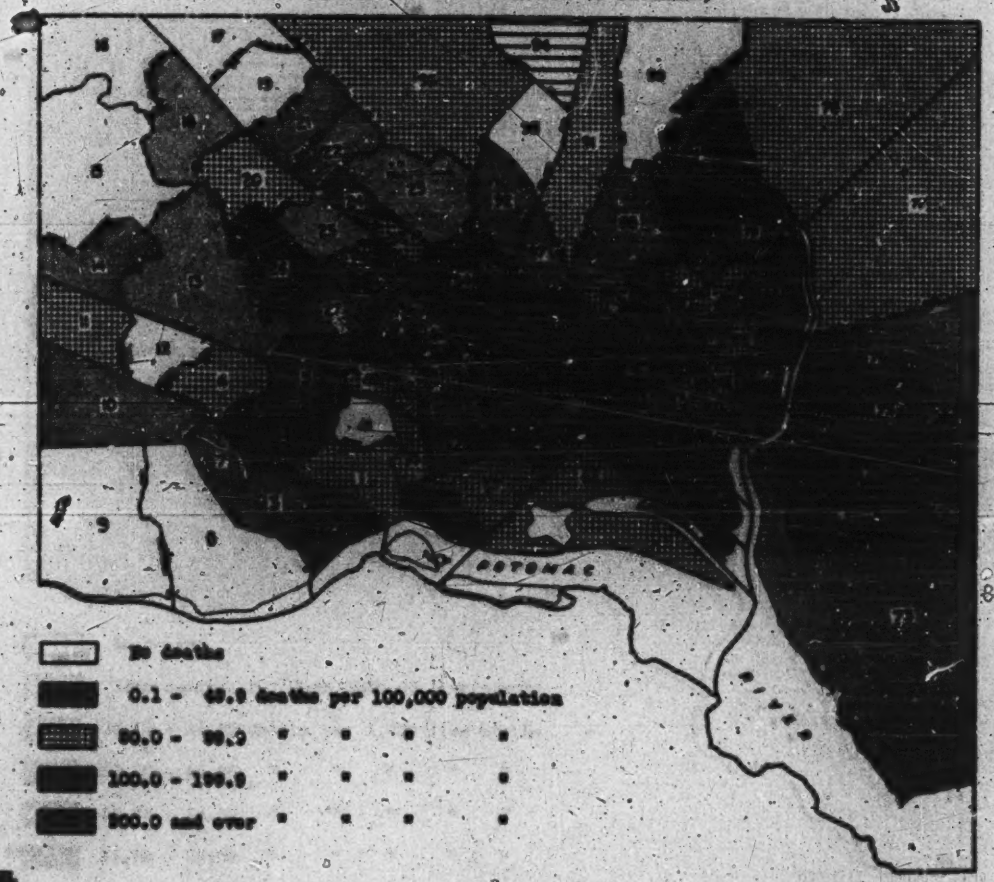

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CHART 3

CHART 4

INFANT MORTALITY RATE IN THE DISTRICT OF COLUMBIA, 1957
(per 1,000 live births)
(Census Tract of Residence of Mother)

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District of Columbia

TOTAL ARRESTS MADE BY METROPOLITAN POLICE DURING 1937 OF PERSONS UNDER 21 YEARS OF AGE
(Exclusive of Traffic Violations)
(Census Tract of Residence of Persons Arrested)

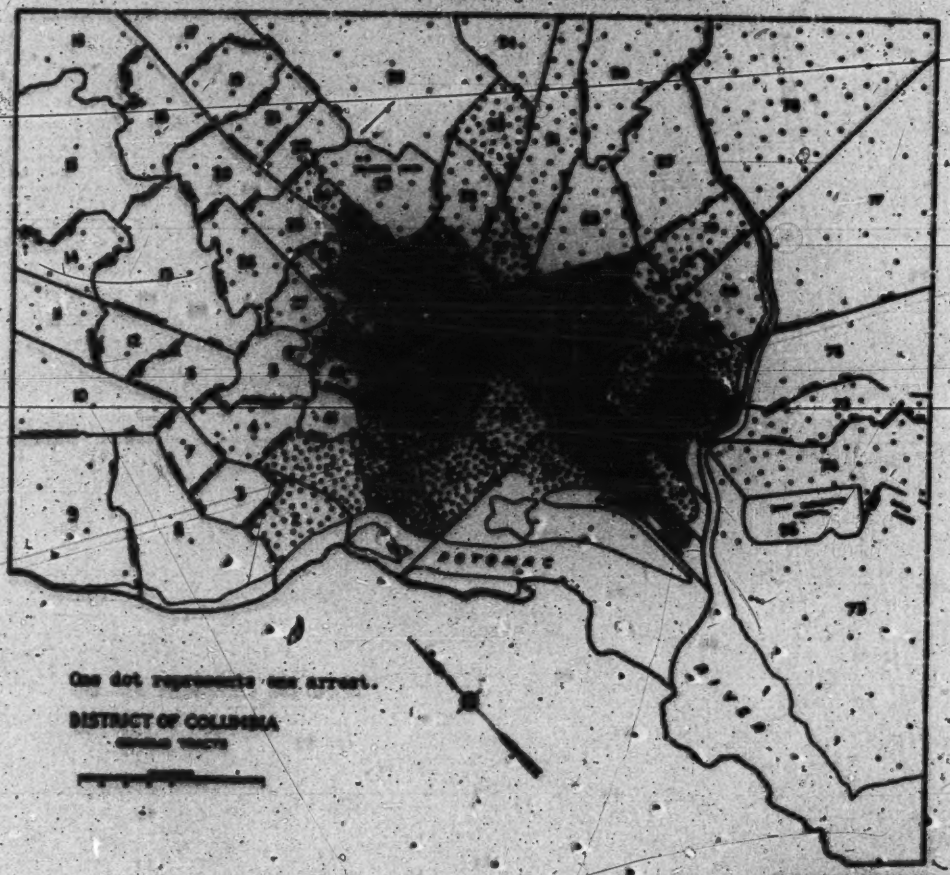

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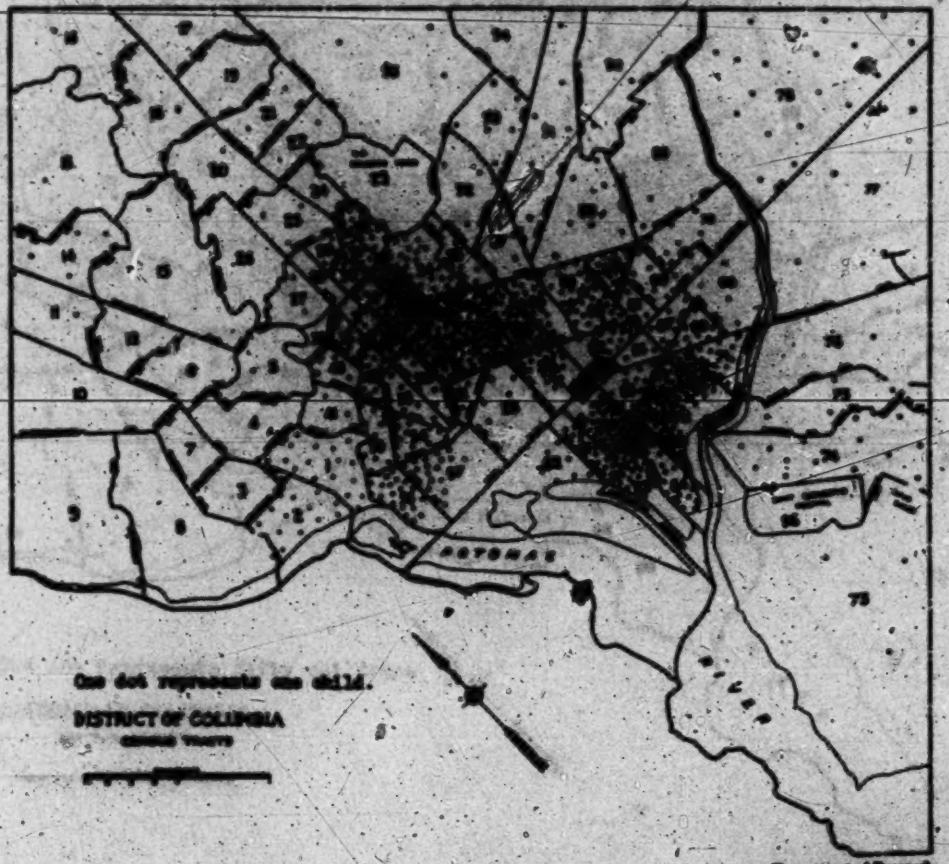
Chart 5

JUVENILE COURT OF THE DISTRICT OF COLUMBIA
Delinquent Children Committed to Institutions or Placed on Probation During 1957
(Census Tract of Residence of Children)



One dot represents one child.

DISTRICT OF COLUMBIA

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Chart 6

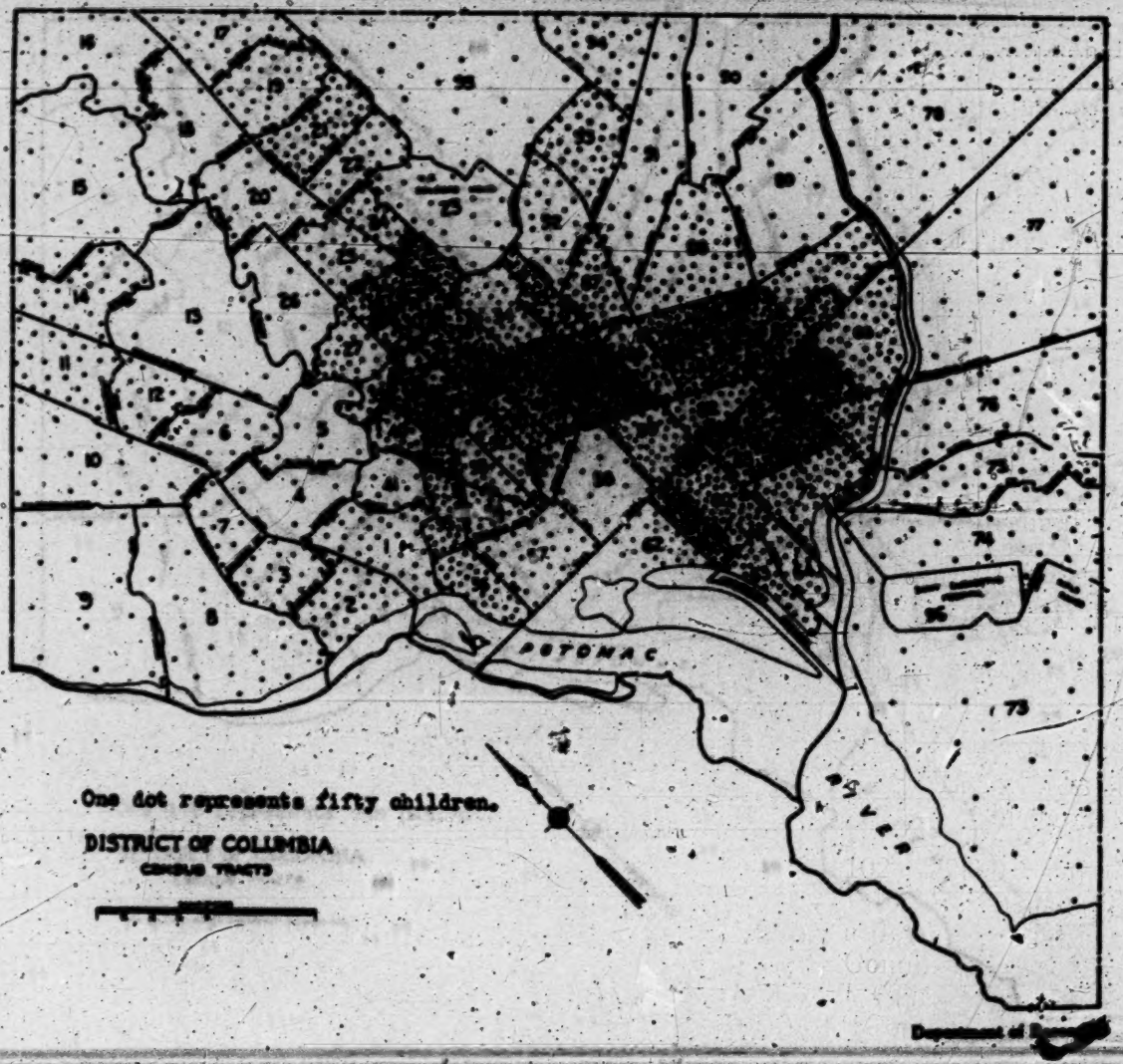
POTOMAC
One dot represents fifty children.
DISTRICT OF COLUMBIA
CENSUS TRACTS

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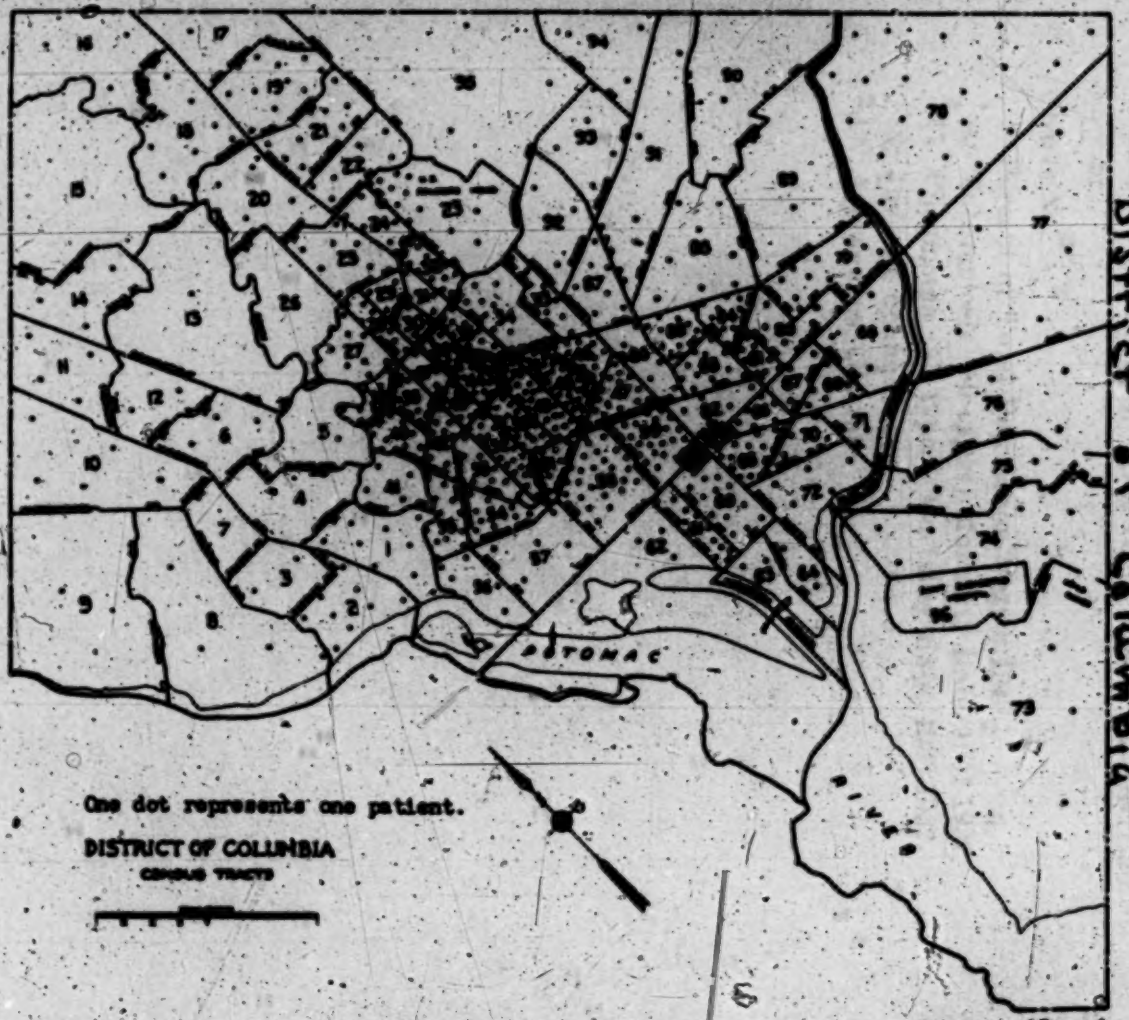
Chart 7

(Census Tract of Residence of Patients)



District of Columbia

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Chart 8

APPENDIX

MAPS OF CHICAGO, ILLINOIS, SHOWING DISTRIBUTION OF:

Charts No.

9. Percent of Total Population Negro, 1940.
10. Tuberculosis (all types) Mortality Rate, 1931-1937.
11. Pneumonia (all types) Mortality Rate, 1933-1937.
12. Juvenile delinquency.
13. Average insanity rate.

Chart 9

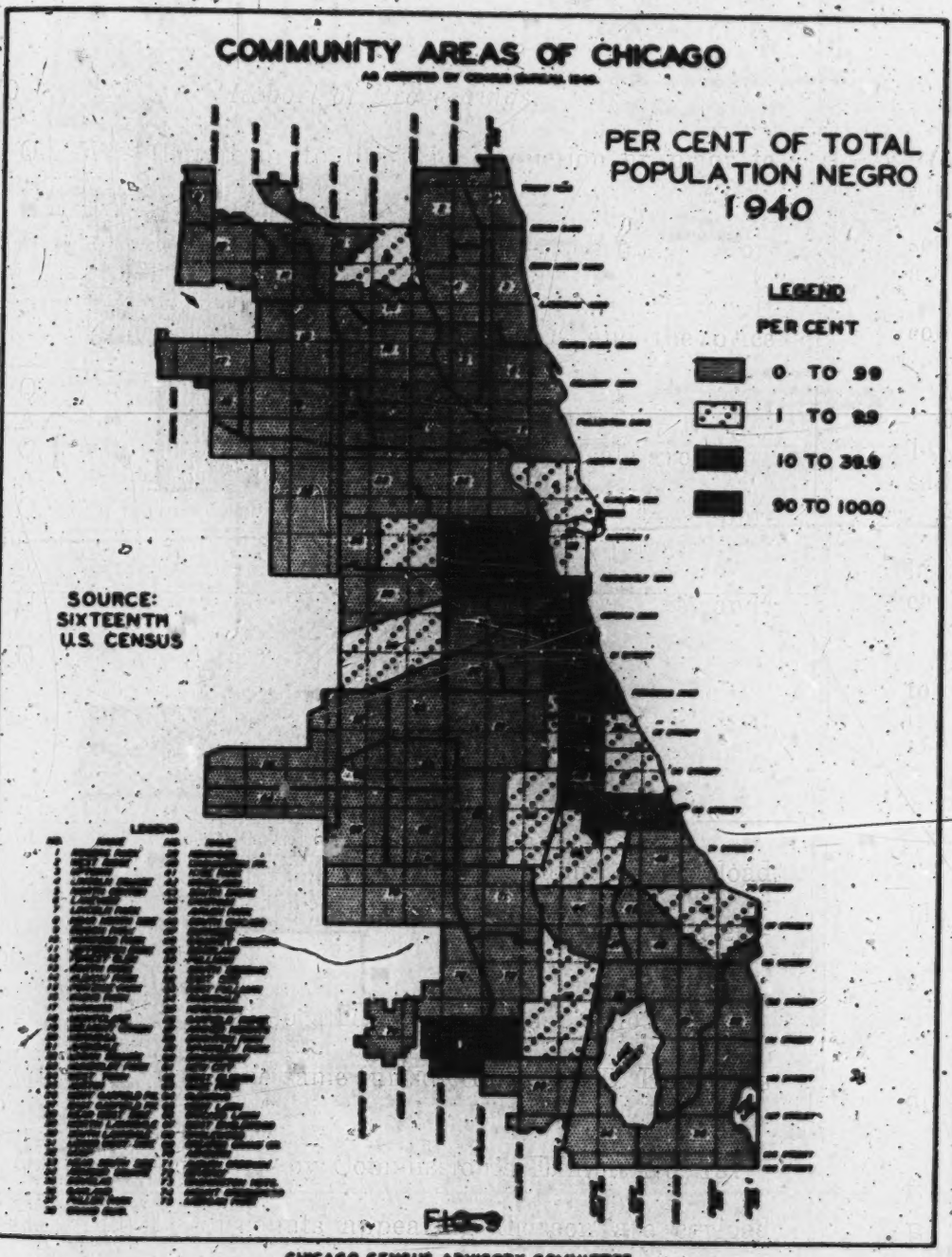


Fig. 9

CHICAGO CENSUS ADVISORY COMMITTEE

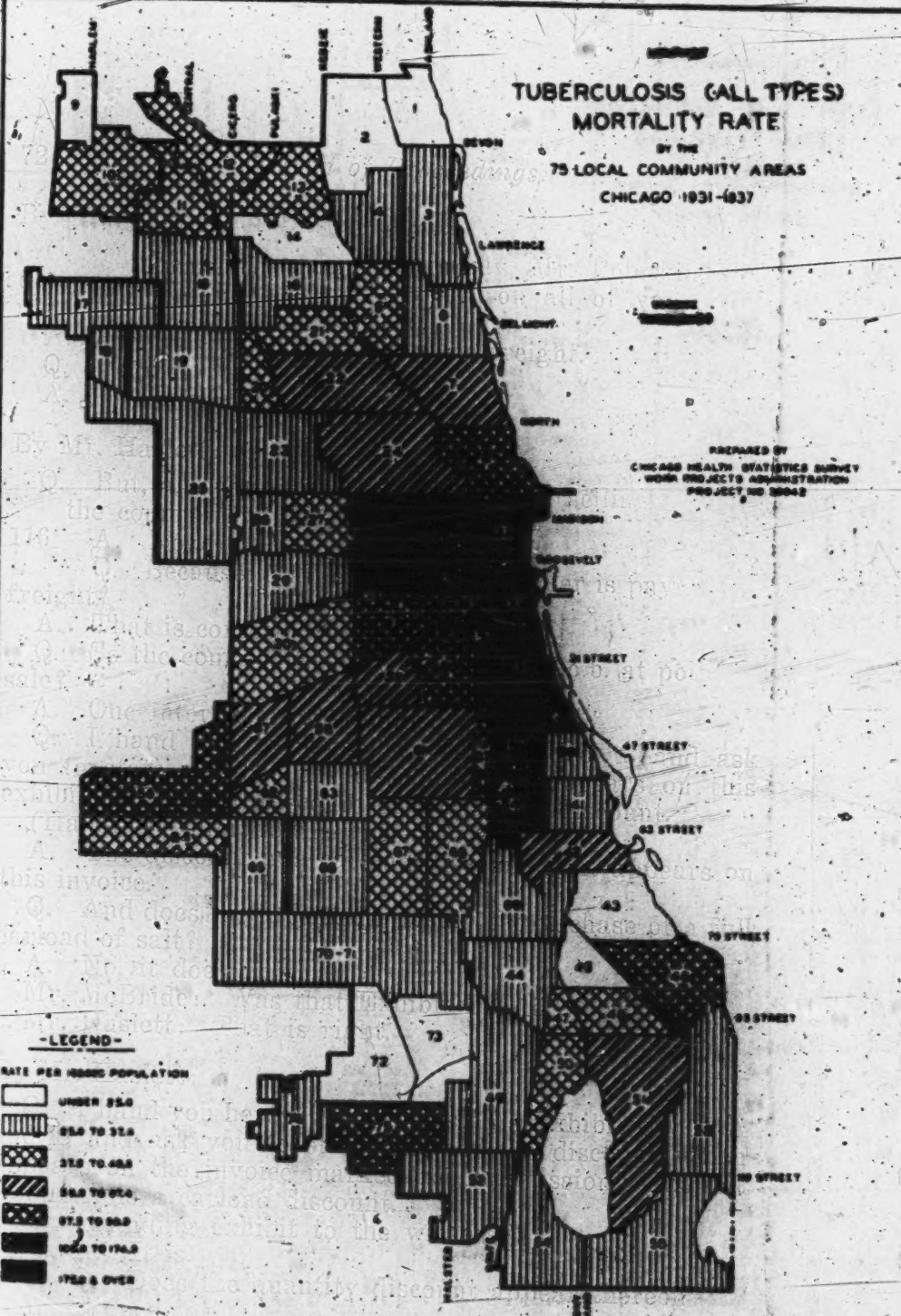

TUBERCULOSIS (ALL TYPES)
MORTALITY RATE
BY THE
75 LOCAL COMMUNITY AREAS
CHICAGO 1931-1937
PREPARED BY
CHICAGO HEALTH STATISTICS SURVEY
WORK PROJECTS ADMINISTRATION
PROJECT NO 30042
DEVON
LAWRENCE
ROOSEVELT
31 STREET
47 STREET
63 STREET
79 STREET
93 STREET
-LEGEND-
RATE PER 100000 POPULATION
UNDER 25.0
25.0 TO 37.5
37.5 TO 49.9
50.0 TO 87.4
87.5 TO 99.9
100.0 TO 174.9
175.0 & OVER

Chart 11

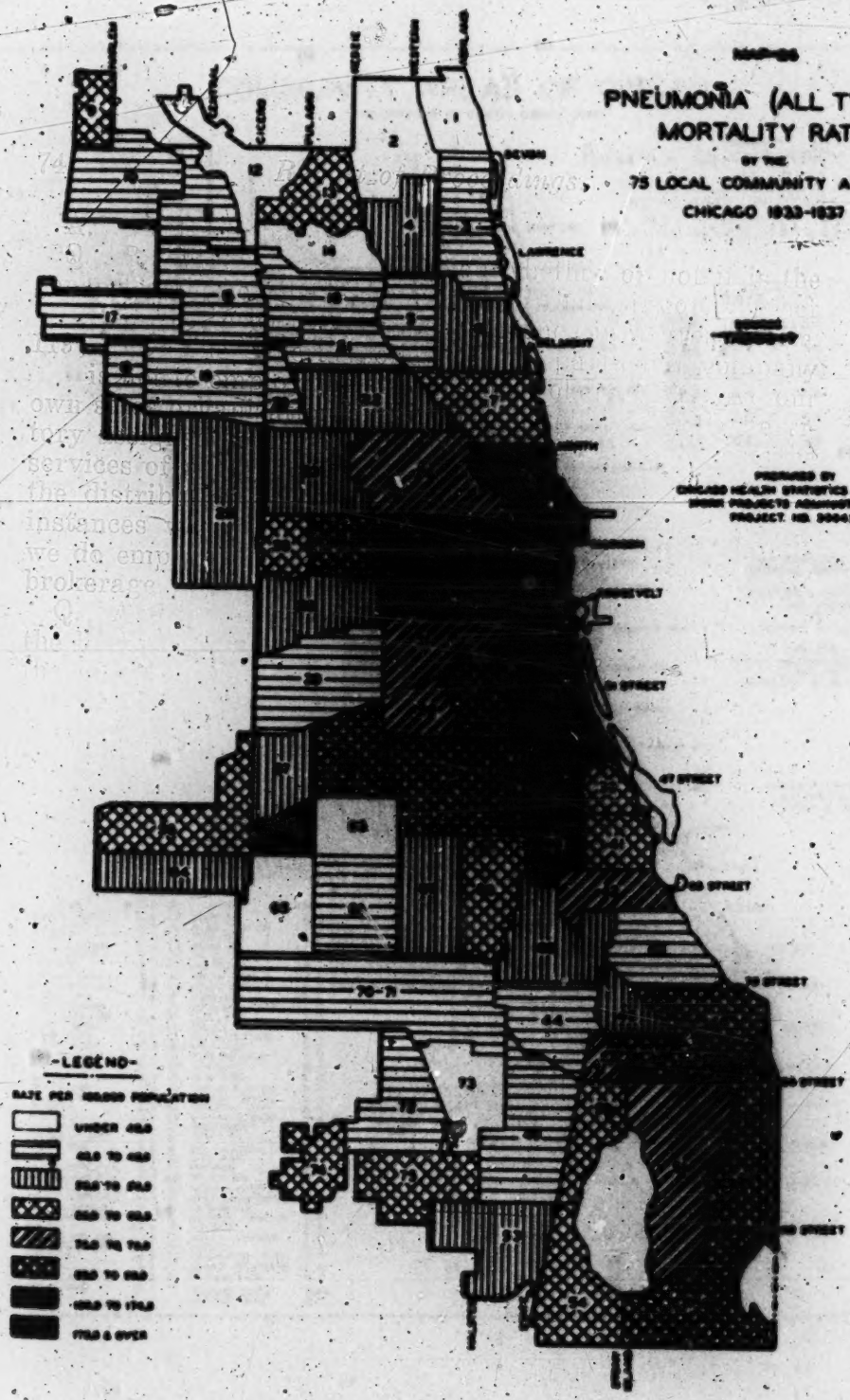

PNEUMONIA (ALL TYPES)
MORTALITY RATE
BY THE
75 LOCAL COMMUNITY AREAS
CHICAGO 1933-1937
PREPARED BY
CHICAGO HEALTH STATISTICS SURVEY
WORK PROJECTS ADMINISTRATION
PROJECT NO. 30043
-LEGEND-
RATE PER 10,000 POPULATION
UNDER 410.0
410.0 TO 460.0
460.0 TO 510.0
510.0 TO 560.0
560.0 TO 710.0
710.0 TO 860.0
860.0 TO 1010.0
1010.0 TO 1160.0
1160.0 & OVER
DEVON
LAWRENCE
47 STREET
63 STREET
70 STREET
79 STREET
87 STREET
95 STREET

Chart 12

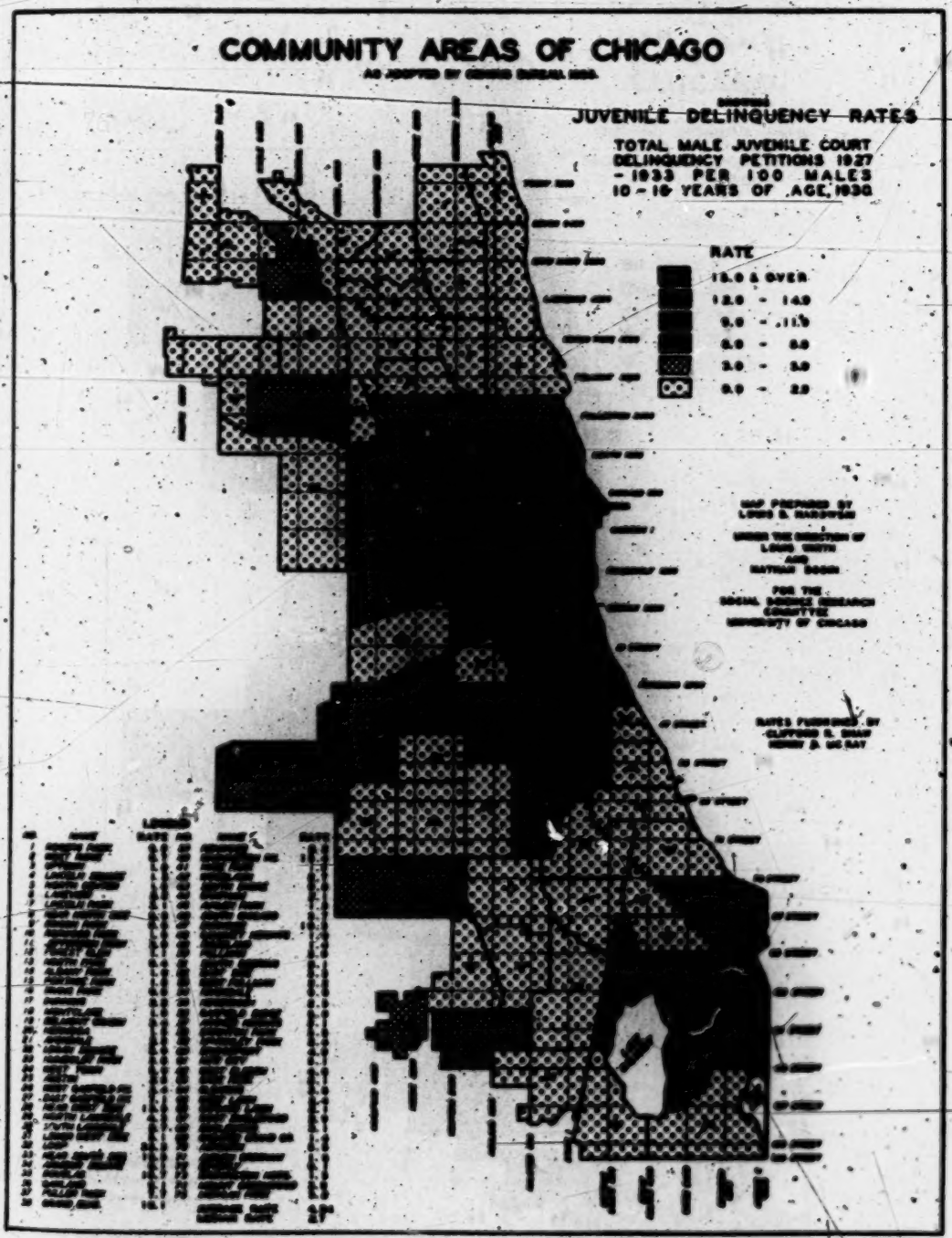
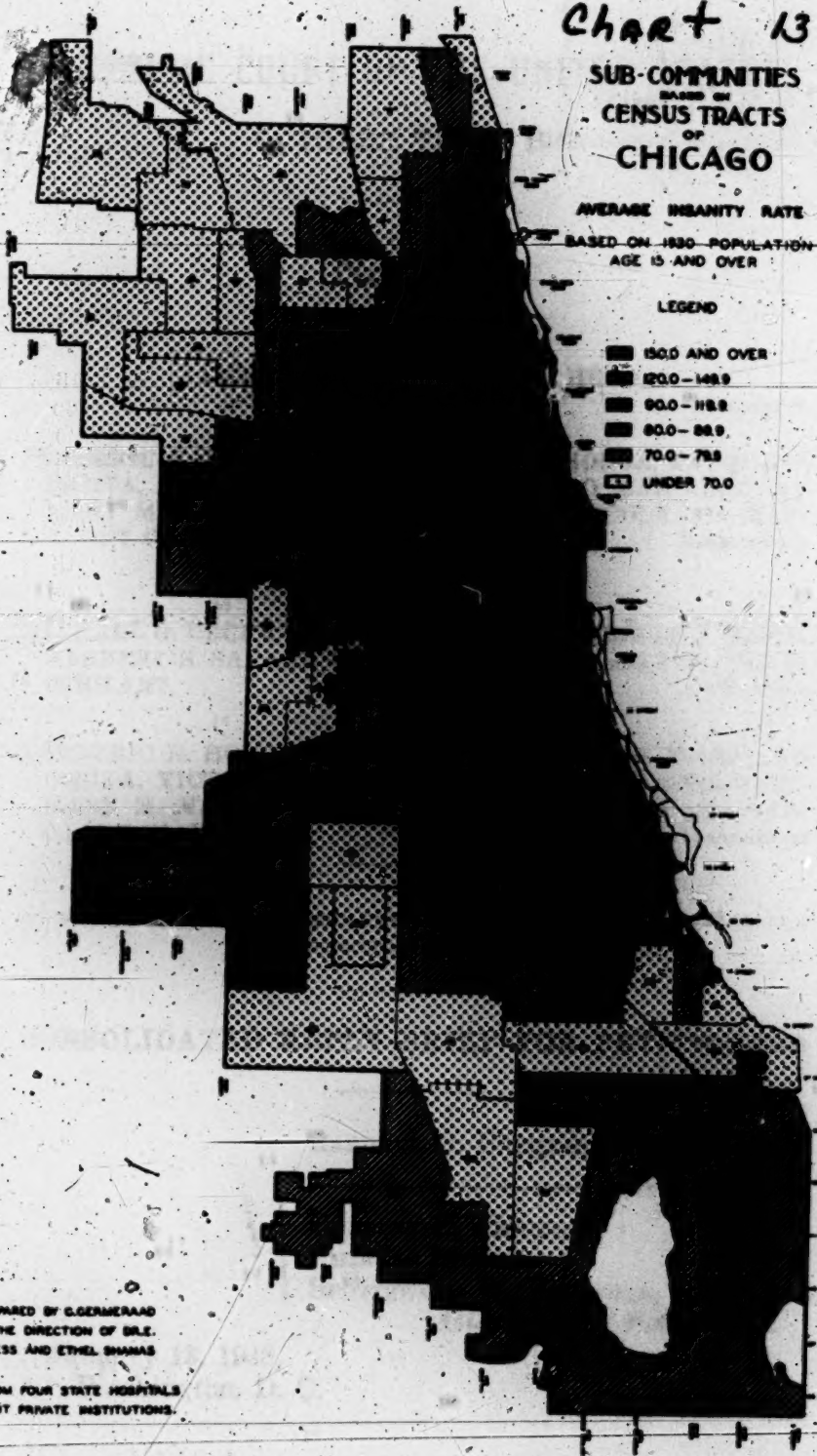

COMMUNITY AREAS OF CHICAGO
JUVENILE DELINQUENCY RATES
TOTAL MALE JUVENILE COURT DELINQUENCY PETITIONS 1927 - 1933 PER 100 MALES 10 - 16 YEARS OF AGE, 1930
RATE
18.0 & OVER
12.0 - 14.9
9.0 - 11.9
6.0 - 8.9
3.0 - 5.9
0.0 - 2.9

Chart 13

SUB-COMMUNITIES BASED ON CENSUS TRACTS OF CHICAGO

AVERAGE INSANITY RATE

BASED ON 1930 POPULATION AGE 15 AND OVER



MAP PREPARED BY E.GERMERAAD
UNDER THE DIRECTION OF DR.E.
W. BURGESS AND ETHEL SHANAS

DATA FROM FOUR STATE HOSPITALS
AND EIGHT PRIVATE INSTITUTIONS.